



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

FOREWORD

This volume is an exact photo-reproduction of an original copy of

MICHIGAN LAW JOURNAL

Volume 1

1892

As an original is practically unobtainable, this reprint is offered to enable law libraries to fill out their collection of legal periodicals.

The reproduction follows the original in every detail, and no attempt was made to correct errors and defects in typography.

**Buffalo, N. Y.
November 1962**

DENNIS & CO., INC.

MICHIGAN
LAW JOURNAL.

VOLUME I.

GRAND RAPIDS, MICH.
ANN ARBOR, MICH.
1892.

.....
COPYRIGHT, 1882.
.....

MICHIGAN LAW JOURNAL.

VOL. I.

FEBRUARY, 1892.

No. 1.

METHODS OF APPOINTING PRESIDENTIAL ELECTORS.

HON. THOMAS M. COOLEY.

In the practical operation of no other provisions of the Constitution of the United States were the expectations of those who framed it so completely disappointed and confounded as in those made for the election of president and vice-president.

The original article on the subject provided that, "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator or representative or person holding any office of trust or profit under the United States shall be appointed an elector." It then went on to provide for the meeting of these electors in their respective states, and for the casting of their votes respectively for two persons; the person having the highest number, when all were aggregated, to be declared elected president, if the number received be a majority of all, and the one having the next highest number to be vice-president; with provision for a choice by the national House of Representatives between the two having the highest number, if their votes should be found to be equal. It was supposed that by this complicated system of election, the highest wisdom of the country would be best expressed in the choice finally made; each state selecting its most trusted citizens for electors, and these being left entirely free in the exercise of their judgment as to the persons most worthy to be elevated to the two offices respectively.

It is interesting to note now how completely satisfied were the makers of the Constitution, speaking through Mr. Hamilton in the *Federalist*, with this method of choice. "Nothing," he says, "was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." This would be happily accomplished "in the plan devised by the convention, which is that each state shall choose a number of persons as electors equal to the number of senators and representatives of such state in the national government, who shall assemble within the state and vote for some one person as president." The process "affords a

The Republicans had a large majority in the assembly; the Federalists, a small majority in the senate. The assembly, conceding that the choice must be made by the legislature in the absence of any other provision, invited the senate to meet them in joint convention for the purpose; insisting that that was the proper method for making choice by the legislature. The senate refused this, claiming that the choice must be made by a concurrent vote. An angry controversy was carried on for some time. The Republicans had just carried the state in a popular election by a large majority, so that the lower house unquestionably represented the popular will, but with the refusal of the upper house to meet with them in joint convention, it was impossible to give expression to this will in the choice of electors. Some compromise became essential and it was finally effected by allowing to the Federalists seven of the fifteen electors to which the state was entitled.* All these facts were fresh in the minds of the people of the country when the amendment to the article relating to the election of president and vice-president was proposed, and a little reflection, it would seem must have satisfied any one that the resorts which at this time were had to give expression to the voice of a state in the electoral college independent of the real will of its voters were but a few of the many that were possible under the Constitution as it then stood.

When the election of 1808 took place, the choice of electors in one of the states presented some circumstances which are worthy of notice. Massachusetts in 1804 had given the choice of electors to the people. The state was Federal, and it was thought reliably so; and the choice of electors by the people it was supposed must certainly be the same as when made by the legislature itself. For the next two or three years, however, the tendency of popular favor was strongly towards the Republican party, and the leaders of the Federal party in Massachusetts were not so confident as they had been previously, that a popular vote might not possibly result in the choice of Republican electors. Having the legislature safely in their own hands therefore, they determined to make choice through that body, and notwithstanding popular protests that were made, they proceeded to do so.† The bad precedents of one party are quite certain to be imitated by the other, whenever it is supposed that the imitators may gain by doing so, and in this very year the Vermont Republican legislature chose electors favorable to Mr. Jefferson, though the state had just gone against them on a popular vote.‡ In each of these cases, the only excuse whatever that could be advanced for resorting to this particular method of choice of electors, was that otherwise the people might express their will in favor of a different choice. It was in other words to defeat the popular voice if it should be found not to be consonant with the will of the party leaders controlling the legislature for the time being.

* See 5 Hild., Hist. U. S., 402-3; 26 Niles Reg., 17.

† 2 Schouler, Hist. U. S., 184.

‡ 2 Adams Hist. U. S., 285.

The controversy over the method of choice which created at the time most bitterness and most attracted the attention of the country occurred in the year 1824 in the state of New York. In that state the legislature was still making choice of the electors, as it was also in six other states; seven other states choosing by popular elections in districts, and ten by popular elections on general ticket.* New York was supposed to be unquestionably a Republican state; indeed the Federalists as a party had now scarcely an existence. The machinery of the Republican party had up to this time been in the hands of what was sometimes called the "Virginia Oligarchy," and the nominations for president and vice-president for that party had been made through a caucus of the Republican members of Congress. The caucus at this time, very thinly attended, had nominated for president, Mr. William H. Crawford of Georgia. The nomination was exceedingly distasteful to large numbers of the Republicans, particularly in the northern states, where Mr. John Quincy Adams had vast numbers of friends, and where also General Jackson, Henry Clay, and Mr. Calhoun had their earnest supporters. It was believed that if the vote of New York was cast for Mr. Crawford, he was reasonably certain of being chosen president. The legislature was Republican and was thought likely to follow the lead of the caucus and select electors favorable to him. The supporters of other candidates believed that if the election could be referred to a popular vote, Mr. Crawford could not carry the state; and a popular movement which seemed almost irresistible was started, demanding that the choice be referred to the people. The movement was so strong that the lower house of the legislature felt itself unable to resist it. The political fortunes of the members seemed to be involved in their yielding to the popular demand, and in giving the means of expressing the popular voice which the demand called for. The senate also hesitated to take any other course, and at first agreed in a resolve that it was expedient that the choice of electors should be made by general ticket voted for by the people throughout the state. But this vote was extorted from the fears of the majority, and at a later day under the leadership of Silas Wright, an "immortal seventeen," as it was long called in derision, which constituted a majority of the body, voted to postpone action until the day of the general election in November. It was not doubted that the friends of Mr. Crawford would carry that election, and that the legislature to be then chosen would choose electors favorable to his election.

These gentlemen were surprised when the election came off to find what a popular whirlwind their action had created. Besides refusing the general demand for a popular vote for electors, they had removed Mr. DeWitt Clinton from his office of canal commissioner for no better reason than that at the time he was not acting in accord with them politically. The consequence was that the people, who looked up to him as the father of the canals, took him up as a candidate for governor and elected him by a

* 3 Schouler, Hist. U. S., 312.

great majority, choosing at the same time a legislature in which Mr. Crawford's friends were decidedly outnumbered by the friends of other candidates. But as no one candidate had a majority of all, a combination of interests became essential, and this was accomplished by the friends of Mr. Adams and Mr. Clay, who agreed upon a ticket to be supported by all. The outcome was that Mr. Crawford received but five of the thirty-six electoral votes cast for the state, and even these were given him in violation of the understanding which had been entered into, and for the purpose, it was said, of preventing Mr. Clay, who was a great favorite in Congress, from being one of the three from whom the president must be chosen in case of the election being thrown into the House of Representatives.*

Great, however, as was the disappointment of the leaders who prevented a popular vote on this occasion, what was actually done by them was sufficient to make plain how easily the right to make choice between several modes of election might be improperly perverted to party ends by action taken shortly before the election, and this, too, when the purpose might be to defeat what it was believed would be the popular will if the people were given the opportunity to express it in some stable mode previously determined by law. The Constitution does not in fact require that any note shall be taken of the popular will when the legislature proceeds to determine the manner in which presidential electors shall be chosen, and nothing but fear of popular condemnation can ensure its doing so.

While the New York controversy was pending, pamphlets were published by the opponents of Mr. Crawford having for their text "The Sovereignty of the People," which the writers contended was violated by a choice of electors in any other mode than by direct popular vote;† though a little reflection must have convinced any fair-minded person that by the most emphatic as well as the most important act of sovereignty ever performed by the people of the American Union, namely, the adoption of the Federal Constitution, the choice of some method besides that of popular election had very plainly been made allowable.

Mr. Hammond, a very careful and judicious observer, has in his "Political History of New York" expressed the opinion that if the Crawford men who controlled the legislature had boldly and unhesitatingly yielded to the general demand, ordered a popular election and then appealed to the Republicans of the state to stand by the party nominees, they might have carried the election for Mr. Crawford. And he very justly adds, "If I am right in these conjectures, they furnish additional evidence that, in public as well as in private transactions, ultimate success is most effectually secured by frankness and candor, and that in politics as well as in private dealings between man and man *honesty is the best policy*."‡

*Shepard's VanBuren, p. 88.

† Mr. Hezekiah Niles published many essays on this subject in the twenty-seventh volume of his Register, and these were also separately published and had a large circulation.

‡ Political History of New York, Vol. 2, p. 179, 180. Mr. Niles, in his Register, Vol. 32, p. 418, says that in 1827 two States still chose electors by the legislature and six by popular vote in districts. One of the last was Kentucky, which for the choice of its fourteen electors was divided into three districts.

This brief reference to historical facts would seem however to show conclusive reason why some single method of making choice of the electors by the separate states should be fixed upon by constitutional amendment and made applicable without exception. The temptation to abuse the power of choice as it now exists to an extent that may shock the sense of political right of the whole country may sometimes prove irresistible. The interest of a party controlling a state through its legislature to carry a particular election may seem so strong as to impel it to incur all possible risks of public condemnation throughout the country, rather than to let the opportunity go by of determining the choice by the exercise of such power as may for the time being be constitutionally in their hands, especially as it will commonly be easy to assign excuses for so doing which to the party itself at least will appear plausible.

Should, however, an amendment be made for the purposes of uniformity, it is by no means certain that any one of the methods which has hitherto been employed would be agreed upon. It is perhaps quite as likely that the scheme of interposing presidential electors between the people and the final result would be abolished altogether and the choice be determined upon a count of ballots cast directly by the voters of the several states for candidates named by themselves as their choice for the chief rulers of the country. This would at least have the advantage of giving the minority in every state a voice in the final result which under the existing provision they do not possess. But whatever schemes should be brought forward, and however diverse in general plan or special features, there will probably be found a general consensus of opinion among their promoters that though the plan of election embodied in the Constitution at first might have seemed perfect in theory, it could never be successful in practice except in that ideal state which any of us may contemplate with desire but not one of us is sufficiently optimistic ever to expect to see established. *

* See Life of Timothy Pickering by his son, Vol. 3, p. 103.

After the presidential election of 1824 Mr. Macduffe, of South Carolina, introduced into Congress an amendment to the Constitution to make the method of appointing electors throughout the United States uniform by giving the choice to the people in districts, and Mr. Quincy, in his "Figures of the Past," p. 3-3-288, gives an interesting account of the debate upon it. Other amendments were proposed to take the election from the House of Representatives when no choice was made by the electors. Of these President Adams, when spoken to on the subject by Mr. Rush, said: "I told Mr. Rush distinctly what my opinions were; that I had expressed speculative opinions favorable to an amendment of the provisions in the Constitution for the primary election of president and vice-president. In the constitutional organization of the electoral colleges I had thought it would be more conformable to the analogy of the whole Constitution if the whole Union should be divided into election districts, each district to choose one member of the House of Representatives for each Congress and one elector at each presidential election, and that the legislature of each state should elect the two additional electors. I had expressed the belief that this would be an improvement; I am still inclined to the same belief; but I never have believed, or said anything to indicate the belief, that in the only contingency which assigns the election to the House of Representatives it ought to be taken from them and given to another body; for, setting aside all reference to the last or to the next election, I thought, in the peculiar contingency of a divided vote in the electoral college, without a majority for any one candidate, the House of Representatives was, of all others, the body peculiarly fitted for making the selection." *Memoirs*, Vol. 7, p. 301 (1827).

In 1873 Senator Morton, of Indiana, proposed an amendment to the Constitution in order to secure uniformity by requiring the electors to be chosen in districts; each state being divided into districts for this purpose equal to the number of representatives in the lower house of Congress. There was in this no provision for two from the state at large.

PRESIDENTIAL VOTING METHODS.

HON. B. M. CUTCHEON.

Under this title, in the *Century's* "Topics of the Time" for October, the writer makes the following statement: "The language of the provision of the Constitution in which the final verdict of the convention was set forth, *precludes all doubt* as to the meaning of the system's framers: 'Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress,' etc. That leaves no possibility of doubt that the convention gave the absolute control of the appointment of electors to the state legislatures, for as Alexander Johnson says in his history of the system, the words 'in such manner as the legislature thereof may direct' are as plenary as the English language can well make them."

The writer of the article thereupon concludes: "When, therefore, the last legislature of Michigan passed a law providing for the choice of electors by districts . . . it was *exercising an undoubted right, given it by the Constitution.*" After this summary disposal of the whole question of the constitutionality of the district system of choosing electors, it may seem a vain thing to discuss it; but as there are a great many intelligent people, including some very good lawyers, who do not agree to that view, it may be worth while to file a dissenting opinion, and present the other side of the case.

The power of a State to appoint presidential electors is a delegated power, and delegated only. It is not among the natural or inherent rights of States. It is delegated to the States by the people of the United States through the Constitution, and cannot be re-delegated to districts or minor municipalities. It must be exercised by the States, as such, as trustees of the power.

The Constitution declares that "each STATE shall appoint," etc. What is a State within the meaning of the constitution? The Supreme Court of the United States has declared in various decisions, that a State is a body corporate and politic," "an artificial person," "all the people of one State," "the combined idea of people, territory and government."

What "State shall appoint" electors?

The same State that is entitled to Senators and Representatives. It is the same State that is "a member of the Union"—it is the body corporate and politic in its entirety, one and indivisible.

The Constitution provides that "no State shall enter into any treaty, alliance or confederation," etc. "No State shall, without the consent

of Congress, levy any imposts or duties on imports or exports," etc. "No State shall, without the consent of Congress lay any duty of tonnage," etc.

Will it be for a moment contended that in these clauses anything is meant but the State which is the body corporate and politic? But these clauses immediately precede the one in question, which declares that "each State shall appoint," "electors equal to the whole number of Senators and Representatives to which the State may be entitled."

Again, section 2, article III, provides that "the judicial power shall extend . . . to controversies between two or more States."

Would it be claimed that a state legislature might parcel out a cause of action among twelve congressional districts, and direct that each district should bring action for one-twelfth of the claim, and that the action of such districts would be the action of the State? Better and more reasonable this than to attempt to apportion the indivisible power of appointment among twelve districts and then say that the State has appointed.

Those who claim the constitutionality of the district system of appointing electors overlook the world-wide difference between the *jurisdiction*—that is, the right, authority and competency—to execute the power delegated, and directing the "manner" of exercising the jurisdiction.

What, then, may the legislature do?

It may direct the manner in which the State, as a unit, may appoint.

What is "manner?" Webster says that it is "form, method, way of performing or executing." The jurisdiction to appoint is delegated to the State as a body corporate and politic; the "manner" of exercising this indivisible jurisdiction is left for the legislature to direct, but the manner must be such that the act of appointment will be the act of the State in its entirety. To illustrate: The appointment may be made by the legislature in joint convention or by the legislature by concurrent resolution; or by public act, requiring the approval of the Governor; or it may be by the people of the State at large, by general ticket, as it has been done by all the States since the war; or by the people at large, of candidates required to reside in certain districts; and perhaps in other ways. All these manners have been actually practiced.

But the legislature cannot delegate or remit the power or jurisdiction of appointing to certain congressional districts and vulgar fractions of a State, as has been attempted in Michigan. The "STATE shall appoint" the electors. It must appoint them all, and the act of a district is not the act of a State.

The language of the Constitution "leaves no possibility of doubt," that the appointment of electors is entrusted to the States as units, and that the power of the legislature is "plenary" only as to the "manner" of appointment.

This plain meaning of the words of the Constitution finds confirmation in facts *aliunde*:

1. In the constitutional convention it was moved by Wilson of Pennsylvania that electors be appointed by the people, by districts, but the motion was rejected, eight States to two.

2. In case no candidate for President receives a majority of all the votes in the electoral college, the election goes to the House of Representatives, and there the election is not by districts but by States, each State having one vote.

3. The uniform and unbroken practice of all the States for sixty years shows the consensus of opinion of States and statesmen as to the proper and constitutional method of appointing electors, and the appreciation of the evils arising from a departure from it.

Massachusetts alone of the New England States adopted the district system, and practiced it at but few elections.

New York, only, of the Middle States tried it, and but once, at the election of 1828, and immediately abandoned it.

Indiana resorted to it in 1824 and 1828, and repealed it before the election of 1832.

Illinois experimented with it in 1820 and 1824, and then dropped it for the general ticket. This sums up the entire extent to which it has been practiced in the Northern States. In the Southern States, Maryland, Virginia, and North Carolina of the Original States, and Kentucky and Tennessee of the New States held to the district system for greater or less periods of time.

These States also held to the constitutionality of nullification and secession *for a much longer period*.

Virginia abandoned the district system prior to the election of 1800, for the reason that it destroyed her power and influence in the electoral college. The other Southern States continued it longer, but the election of 1832 was the last in which any State chose electors by districts.

In this connection it may be interesting to recall that in the year 1800, during the governorship of John Jay, first Chief Justice of the United States, an attempt was made by the Republican (now Democratic) party of New York to introduce the district system in that State. It passed the House but failed in the Senate, "The Federalists declaring that such an act *would be unconstitutional*, and that it was essential that the State should act as a body corporate in the choice of presidential electors." (Pellew's Life of John Jay, p. 330).

As Jay was at this time the official head of the Federal party in New York, we are fairly warranted in assuming that he held the district system to be unconstitutional.

The fact that this system was practiced in a few States for a time constitutes no valid argument for its constitutionality. *That* is a question for the courts, and for the courts alone, and they have never passed upon it.

Neither lapse of time nor occasional practice can settle constitutionality. Almost every State in the Union practiced the regulation or prohi-

hibition of the traffic in alcoholic liquors, brought into one State from another State in the "original packages," but only in 1890, after a century of unbroken practice, was it declared unconstitutional.

The district system violates the plain letter of the Constitution, which declares that "each STATE shall appoint;" it introduces confusion and uncertainty; it fritters away and destroys the power and dignity of the States which adopt it; it stimulates reprisals and counter-plots to gain partisan advantage; it inevitably promotes "gerrymandering" in those States, as we have witnessed in Michigan during the present year; it intensifies the bitterness of partisan politics, and, in a word, its tendency is wholly to demoralization of the body politic. It is a matter of profound regret that under exceptional circumstances, and for temporary purposes, the practice which had been uniform and universally acquiesced in as the wisest and safest should have been unsettled by Michigan, and her name thus made a synonym of political trickery.

EMBARASSMENTS TO LEGAL EDUCATION.

PROF. JEROME C. KNOWLTON.

In European countries a student is not allowed to undertake the study of law until he has received a degree equivalent to the A. B. degree in American colleges, and the minimum term of study is three years, and in some cases four or even five years are required. With some mortification, we recognize that the profession of law in this country has not approximated this high standard.

Many able minds are giving much of their best thought to a solution of the questions involved in raising the standard of legal education. The records of the American Bar Association for the past ten years should be read by every person interested in the subject. It is clear that the ideal must come through progression. It can't be reached at one bound. There are certain existing conditions which stand in the way of radical changes.

At this institution, where the graduating classes in the department of law are so large, it is often said: "Law schools are making too many lawyers. Raise the requirements for admission and lengthen the term of study. Make fewer lawyers and better ones." Law schools do not directly or indirectly swell the numbers of those engaged in the practice of the law. They simply offer an education to those who have chosen their profession and are certain of admission to practice, even if excluded from the law schools. Moreover, in point of numbers, law schools are not doing their share in educational work. It is estimated that the two professions of law and medicine are nearly equal in numbers, and that about the same number apply for admission to practice in each; but, as appears by the last report of the United States Commissioner of Education, there were, in 1889, fifty-two schools of law with 3,906 students and 115 schools of medicine with 14,066 students. About 8,000 are annually admitted to the bar, and seventy per cent. of those admitted have not studied in any law school or elsewhere where law is taught as a science; whereas nearly all who are admitted to the practice of medicine have graduated from some school of medicine. One thing is certainly needed, more well-equipped law schools, more largely attended. If there were 1,000 students studying law at this University, it would not indicate that the profession was being overcrowded, but rather that more of those about to enter the profession were seeking the advantages of a legal education.

Only during the past few years has the necessity of making any requirements whatever for admission to law schools been recognized. At

present, schools of the first class generally require a high school education or its equivalent, with special reference to English and United States History. Many do not require this. Of the fifty two law schools in the country, only twenty-one have any entrance examination. One or two announce that applicants for admission shall possess the degree of Bachelor of Arts, or at least a good knowledge of Latin, which has practically the effect of excluding from the study of law all except college-bred men.

There is no better preliminary training for legal study than that which comes from a liberal education, and the time is close at hand when he who rises to eminence at the bar, even in the West, must be a man of great learning and generous culture. But, as against raising the standard too high, it is urged that those who cannot afford a liberal education ought, nevertheless, to be allowed to give to the world the best use of their natural gifts; that requirements should not be above the needs; that one who has not received a college training may study law profitably. There is an education out of colleges which may qualify one for legal study. An intellect sharpened by experience in practical life often comprehends a principal of law very readily. There is present the legal instinct primarily requisite to professional success. The development of law as a science may call for the highest literary culture, but the practice of the law calls for much less and much more. There must be a greater comprehension of the science by intuition and there may be less scholastic discipline.

An amply endowed institution may arbitrarily fix requirements for legal study. It may admit to its department of law only those who have received an A. B. degree. But an institution supported by the public, and returning for such support the greatest good to the greatest number, must adopt a standard with reference to the end in view. In the law department of the University of Michigan over 650 students have registered this year. The youngest is eighteen years of age, the oldest forty-five. Many have received college degrees. More have followed various business pursuits or taught from one to ten years in district schools, high schools and academies. Many have read law from one to three years before coming here. Others have been admitted to practice in their own State. Of the class that graduated in June, '91, over sixty had been engaged in teaching, and of the students present this year over thirty are attorneys at law. A majority of the students are men of mature judgment and old enough to be in earnest. They are making great sacrifices to obtain a legal education. To deny to them the opportunity of doing so, because they are not college graduates, would be very doubtful policy. "To close the doors of the law-school against all but college graduates would turn away the very class who need its benefits most, without preventing or even delaying their admission to the Bar." *

Notwithstanding these considerations, the requirements for admission

* Report of Committee on Legal Education, American Bar Association, 1891.

and the term of study in most of the leading law schools ought to be increased. In only two or three schools does the term exceed two years, and in many one year's study is all that is required for a degree. A course of three years is none too long for the average student who would prepare himself, not simply for admission to the bar, but for success in his profession. There are however some practical difficulties in the way which may be considered.

1. *Attitude of the Profession.* Many leading men of the profession have spoken discouragingly. Recently the chief justices of the courts of last resort in the several states were officially asked whether a period of study should be fixed by law. Seventeen answers were received and ten of these were in the negative. It is said that time is not of the essence, and that all that is required is knowledge of the law. It is difficult to demonstrate why a definite minimum period of study, which is generally regarded as important to a mastery of all other sciences, is not essential to a knowledge of the science of law.

2. *Requirements for Admission to the Bar.* The practice of the states generally with regard to admission to the bar does not advance the cause of legal education. But little is done to render practicable the following of that advice so freely given to law schools. The course of two years' study already provided is far in advance of the requirements for admission to the bar in nearly all the states. Three states require three years study previous to admission; sixteen require only two years, and sixteen have no requirement whatsoever on the subject. In most states the examination for admission is a mere farce. One year's study in a lawyer's office is more than is required to pass it. Against this the profession has protested, but with feeble results. The opponents to raising the standard of admission say: "Give every man a chance. He will soon find his level." He does it, however, at the expense of litigants. An ignorant lawyer is an extravagant luxury. The chance should be given under the most favorable conditions, or the level may fall too low financially and morally. A young practitioner unlearned in the law is at great disadvantage. He may possess many natural gifts which attract attention, but if he wins his cause in court, it must be through cunning and not through an intelligent presentation of his client's legal rights, for he does not know them. Here the saying that ignorance breeds vice is too often illustrated. On the other hand, the young man of average ability who comes to the bar with a mind well versed in the elementary principles of the law is always a formidable adversary. Knowledge of the law is the first prerequisite to success, and often that knowledge which the older practitioners have for the moment forgotten.

Again there is a popular sentiment against the legal profession becoming too exclusive. The state of New Hampshire furnishes an excellent illustration. Under the rules in force in that state in 1833, three years' study was necessary for admission to the bar if the candidate was a college graduate, but if otherwise a period of five years' study was

required. These rules worked well for many years. The bar of the state became distinguished, too much so perhaps. In 1842 a popular clamor arose that the lawyers were aristocrats and didn't represent the people, and the legislature passed what is known as the "Moral Character" statute, which provided "that any citizen of the age of twenty-one years, of good moral character, on application to the superior court, shall be admitted to practice as an attorney." The most outrageous results followed. The questionable conduct of incompetent practitioners was repeatedly before the courts. The celebrated Bryant's case is an illustration. In this case, Gilchrist, J., said: "The statute requires no knowledge of the law, no acquaintance with the practice and no education whatever. The applicant may be destitute of even the rudiments of an education. He may be unable to read or write. He may subscribe to the oaths of the constitution and of office by making his mark. But if he come within the statute he must be admitted." * It is said that Bryant, wholly ignorant of the law, made himself famous as a practitioner by convincing a poor debtor that he was not entitled to the benefit of the statute exempting six sheep from execution because he had only five; that he should have had six, no more and no less. Bryant took the sheep on his writ and afterwards his ignorance or his cunning brought him riches.* Later, the legislature unwittingly passed a statute which enabled the courts to right this wrong by excluding such men from practice. The same feeling against the profession has arisen in many other states. There is a fear that lawyers may become dangerously learned. In Indiana the people have engrafted in their constitution a provision that every person of good moral character, *being a voter*, shall be entitled to admission to practice law in all courts of justice. In the western states generally, the doors to the profession are thrown wide open and every one is invited to try his hand without any previous preparation worth mentioning. One is induced to learn the rules of practice and the "tricks of the trade," and thereby become an attractive trial lawyer on questions of fact before a jury. Jurisprudence, as a science, is overlooked. There is a consensus of opinion among leading men in the profession that this is all wrong, but reason is slow to prevail against sentiment. What answer will satisfy those who say, "Give every man a chance" ?

While the advance of legal education is so retarded by legislation, there is no wonder that seventy per cent. enter the practice of the law through the lawyer's office. The remedy so often suggested is not the only one. Upon all subjects, the common judgment of those directly interested is a greater force than legislation. The desire of the profession to raise the standard, and the wide-spread impression that a thorough legal education is essential to success, is having potent influence upon all aspirants to the bar. Of the law students in the University of Michigan, seventy-five per cent. come from states in which there are practically no

* 24 N. H., 149.

* Report American Bar Association 1881, p. 244.

requirements for admission to practice. Some forty students come from the state of Indiana, which has the generous constitutional provision above quoted. However important it may be to the profession, to the student the question of admission to practice is secondary, if not trivial. A legal education is the desideratum; something with which, when he is admitted within the bar, he may win his laurels. The problem before law schools is what is the best course of instruction in view of the conditions. What will answer for our country will not for another; nor for different parts of the same country.

3. *The time required for a college degree.* To professional students, a liberal education is of more importance than to any other class of persons, and every opportunity ought to be given which will enable them to secure it. Three years devoted to the study of jurisprudence is none too long; but it is said that seven years—four in college and three in a professional department—in view of the length of time required for admission to college, is exceedingly severe, especially in the West, where so many are compelled to obtain an education with their own hands; and that the present practice excludes most college men from schools of law. Their time and resources for educational purposes having been exhausted, they seek the bar through the open door. The problem is squarely before those interested in university education. It has been suggested that the student be permitted to take studies in the professional schools while pursuing a regular undergraduate course. We understand that at Columbia and Cornell this plan is adopted, and that undergraduate students in the literary department may elect studies in the law department and have them credited to both degrees. There is no cheapening of degrees, which are given, not as representing time, but knowledge and culture. Culture may come from the study of jurisprudence as well as from the study of natural science. There is nothing vulgar in technical knowledge. Moreover, a contingent remainder is no more technical than a table of logarithms. Neither is of any value except to the specialist. To the majority of students they are useless, and for that reason alone, according to some educators, the study of both should be included in the college curriculum. Being useless knowledge, they represent culture. In many colleges municipal law, involving the law of personal and property rights, constitutional law, international law, public and private, are given as a part of the course of instruction leading to the A. B. degree. It is difficult to see why professional studies should not be given some value in college work. Upon this subject Dr. Butler, of Columbia college, has well said: "The grafting of certain professional studies on the undergraduate course will (1) still further enrich the course leading to the A. B. degree; (2) stimulate professional education and render it more liberal and less formal and pragmatic; (3) meet the demand for a shorter period of study in college and professional school combined, without sacrificing the interests of either."*

* Educational Review, January 1892, p. 54.

THREE CORPORATION CASES IN 139 UNITED STATES.

HON. ALFRED RUSSELL.

The states, the business community, and the profession may find interesting matter for reflection in one of the latest volumes containing the decisions of our highest tribunal.

The states enact statutes creating corporations and the courts of the states construe and apply the statutes. According to *McCulloch v. Maryland*, the power of creating a corporation is one appertaining to sovereignty without specific authority in the Constitution, and the creation of a corporation is an act of sovereignty. The state courts are clothed with the power of construing the statutes creating or affecting the corporations and declaring what they mean.

The amount of capital shown by the charter has been considered, in America, as fixing the amount which the stockholders are under a legal obligation to contribute for the security of the company's creditors; and, both upon principle and by statute, stockholders have heretofore been required to pay up their stock as against creditors of the corporation. No doctrine has been more firmly established in our American jurisprudence, although it has never existed in England and was first enunciated by Judge Story, in *Wood vs. Dummer*, 3 Mason, 311, in 1824. As a general rule when there is an actually paid up stock insolvency does not occur.

1. *Clark v. Bever*, 139 U. S., 96. The above propositions being unquestionable law, the state of Iowa created a railway company, and enacted statutes prohibiting transfers of corporate stock with exemption from full payment; and the Supreme Court of the state applied and enforced these statutes in *Jackson v. Traer*, 64 Iowa, 469, *Boulton Co. v. Mills*, 78 Iowa, 460, and *Tama Co. v. Hopkins*, 79 Iowa, 653, and held such exemptions illegal and void as to creditors.

The above named railway company, being indebted to a construction company in the amount of \$70,000, issued to that company stock of the railway company in payment at \$20.00 for a \$100.00 share, with a stipulation exempting the holders from full payment; and the members of the construction company divided the stock among themselves. One of the members, George Greene, a citizen of Iowa, received, as his proportion 910 shares. Clark, of Ohio, a judgment creditor of the railway company, (which was insolvent, so that its stock had no market value), proceeded against Bever of Iowa, Greene's administrator, in the Circuit Court, Iowa, a court clothed with probate jurisdiction, to procure the allowance of the unpaid \$80 on each of Greene's shares of stock, as a claim against the estate, and the case was removed into the United States Circuit Court.

Now, here were two corporations deriving life entirely from the laws of Iowa; and here was a case where the real question in issue was one not federal, but arising solely in relation to the proper construction to be given to Iowa laws, and where there might be a purpose to escape the construction given by the Supreme Court of the state to the laws of the state, (as was said by Circuit Judge Pardee in *N. O. Works v. Southern Co.*, 36 Fed. Rep., 835.)

The United States Circuit Court refused to enforce the state statute, making the stipulation exempting the holders from full payment void as against creditors, upon the ground that the stock was worthless; and directed a verdict in favor of Greene's estate, admitting at the same time that the case before the court was "*the very case*" passed on in *Jackson v. Traer*, (*Clark v. Bever*, 31 Fed. Rep., 670), and the United States Supreme Court affirmed the decision below.

Accordingly, it will be perceived that the Federal Supreme Court not only refused to enforce the state statute as construed by the state decisions, but also refused to follow a long line of its own decisions establishing a principle of law consonant with the Iowa statutes, viz., that a contract between a corporation and its members, that they should never be called upon to pay the remainder of part-paid stock, is void as against creditors; and that such remainder is a trust fund which creditors may reach.

Now, as to the first matter, the failure to follow the Iowa decisions upon the Iowa statute, we had "well hoped" (as the bills in *Chancery* say), that the judicial pendulum had ceased to oscillate, and would stand immovably upon the doctrine of the *Lord's Day* case, *Beecher v. Cheshire R. R.*, 125 U. S., 555, followed in the sidewalk case of *Detroit v. Osborne*, 135 U. S., 499; declaring that, in questions concerning the constitution and laws of a state, the Federal Supreme Court would follow the state decisions when administering the jurisdiction given to the national courts to administer the law of the states in controversies between citizens of different states.

This doctrine was applied in a similar corporation case, very recently, *Smith Purifier Co. v. McGroarty*, 136 U. S., 241, where the court followed the Supreme Court of Ohio in *Rouse v. Merchant's Bank*, 46 Ohio State, 493, a case proceeding in part upon the theory that the property of an insolvent corporation is a trust fund for the creditors, but also proceeding upon the law and policy of that state, as declared in decisions of its highest court, and "therefore to be accepted by this court (U. S. S. C.) as decisive of the law of Ohio upon the subject." And the court went on to say that a different doctrine would be *extraordinary*.

As to the second matter in *Clark v. Bever*, the failure to subject the holder of the unpaid stock to the demand of a creditor of the corporation, and in effect the creation of an exception which nullifies the rule, viz., that a corporation may give away its stock, provided it is shown to be worthless, we will speak later.

2. *Fogg v. Blair*, 139 U. S., 118. This case establishes the floating standard of the value of the stock, (considered as a salable security, and not considered as a component part of the capital of the corporation, and such a component part as the member holding it is bound to contribute), as governing liability to the creditor.

It is elementary that there can be no corporation without members and no members without stock; and unless the courts treat the stock as something to be paid in, and paid up, corporations made up only of wind and water will hereafter afflict the business world more than ever before.

In *Fogg v. Blair*, while the former doctrine is professedly adhered to, (as indeed it is also in *Clark v. Bever*), the practical benefit of the doctrine is destroyed utterly.

The case was this. *Fogg* had a judgment against an insolvent corporation and sued *Blair* as a stockholder, holding stock not paid up. *Blair* had been a contractor to build the railroad, and received bonds and stock for construction. The court held, in substance, that if the stock was of no value when issued, and the party receiving it had a just claim, he could not be required to pay up the stock. This practically absolves the stockholders from obligation, and practically renders the capital of a corporation purely nominal.

3. *Stutz v. Handley*, 139 U. S., 417. We now come to a third case. The question here was in substance whether the holders of *bonus* full-paid stock, absolutely given away by an embarrassed corporation to the holders, in order to induce them to buy the bonds of the corporation, were liable to be required, by creditors of the corporation, to pay up the stock.

The transaction did not purport to be a *sale* of the stock. The stock was a "*gratuity*," (p. 420, middle).

This case as well as the two previous cases, ignore the legal character of stock as a promise to pay, as respects creditors, a character affixed to stock by the American doctrine, irrespective of the value as a mere salable thing, and irrespective of the actual intention of the parties.

The decision of the court in this last case seems to be placed upon the ground that the corporation was unsuccessful in business; and, although it had not stopped business, but was still going on, might be compelled to stop unless it could employ this method to induce monied men to come to its relief. It is certainly new doctrine in respect to either a natural or artificial person that either success or failure in business can affect the right of creditors to assets.

What is this method of getting relief? Let us see. The corporation says: "*Lend us money and take our obligation to pay you back in full, with interest, and we will admit you to a membership in our body, (which is to be your debtor), and donate you stock enough to give you voting control, as well as a chance of getting good dividends; and all this without your investing one dollar in our enterprise, or incurring any chance of loss.*"

What reason does the court give for this new doctrine? The reasons given are (1) that the company found it impossible to sell their bonds without giving away the stock; (2) that the object of issuing the stock was to enhance the value of the bonds; (3) that the money lent on the security of the bonds was equal to the value of the bonds and the stock put together. It is difficult to see that these reasons furnish any legal support to the doctrine.

(1) Why should inability to dispose of bonds alter the law? (2) Why should a possible enhancement of the value of the bonds alter the law? (3) As there was no sale of the stock, but it was a mere "gratuity," how did its value, as a consideration for money lent, come in question at all?

Clearly the court holds, by necessary implication, that a corporation, which is solvent and carrying on a successful business, and whose bonds are marketable, cannot give away its stock. The new doctrine, then, is to be confined to unsuccessful corporations.

The very able court below, (41 Fed. Rep., 531, 546), with unanswerable logic, required the recipient of the bonus stock to pay up; and declared that there was no difference in this respect between stock originally subscribed and new stock, issued by an unsuccessful corporation. The Circuit Judge cites "the well considered case of *Flinn v. Bagley*, 7 Fed. Rep., 785," which was decided by the same judge who delivered the opinion in the case we are discussing, and in it he reached a diametrically opposite conclusion upon similar facts. The facts were that Governor Bagley took new full-paid stock in an embarrassed corporation, actually paying but two-thirds of the face and was held liable to creditors for the remainder. In the upper court the judge does not refer to his decision in the District Court, nor does he review the reasoning of the Circuit Judge. The writer argued *Flinn v. Bagley* in the District Court and the case went on appeal before Mr. Justice Matthews, holding the Circuit Court, who took precisely the same view of the law as the District Court on this subject, but reversed the decree on the ground that there was a remedy at law. (Unreported). Two members of the court dissented. The case indicates that the court is short of time.

Manifestly, persons about to deal with corporations hereafter cannot feel warranted in looking to the par of the capital stock indicated by the articles and amendments as a ground of giving credit, or as a source of payment, in any transaction possible to come before the Federal Courts.

In Michigan, the issue of part-paid railroad stock is forbidden, by a statute, which the writer had passed, H. S., § 3,409; applied in *Richardson v. Green*, 133 U. S., 45.

And if there be any man who thinks that judges do not make law, let him look at the English doctrine, Judge Story's opinion in 1824 and the above decisions in 1891.

WRITING INK AND ITS IDENTIFICATION ON WRITTEN DOCUMENTS.

MARSHALL D. EWELL, M. D.

Writing ink such as is generally used for commercial and legal purposes may be conveniently divided into four sorts: first, nut-gall and iron inks; second, logwood and chromium inks; third, inks in which the coloring matter consists of some one of the numerous coal tar colors; and, fourth, carbon inks.

Nut-gall and iron inks consist of an aqueous solution of gallotannic acid combined with proto-sulphate of iron with the addition of a sufficient amount of sulphuric acid to keep the same in solution, and also of some provisional color in order to give the solution a sufficient depth of color when first applied to the paper, the solution of nut-gall, proto-sulphate of iron and sulphuric acid alone being of so pale a color as not to be popular with penmen.

Most of the books which treat this subject describe nut-gall and iron ink as a fine precipitate of gallotannate of iron, held in suspension in the water, which comprises the body of the ink, by the addition of gum or some other similar substance. But a microscopic examination of several of the leading nut-gall and iron inks in the market has convinced me that the coloring matter is not held in suspension in the manner above described. This sort of ink is probably the most durable and best adapted for commercial and legal purposes where the documents are to be preserved for any considerable length of time, of any of the kinds of inks herein described.

Carbon inks are perhaps more durable, but are not so pleasant to use, and the coloring matter being held in suspension, they are apt to become thick and muddy, an objection which does not apply to a good nut-gall and iron ink.

Logwood and chromium inks are of two sorts. They were formerly made of the extract of logwood, chromate of potassium and sodium-carbonate, and were known as Runge's ink.

This sort of ink flowed readily from the pen, was of good color and reasonably permanent, but it had the disadvantage that after a time its coloring matter separated in flakes, leaving a clear, supernatant fluid, so that the ink could not be preserved any considerable length of time. This sort of ink has, so far as known, entirely disappeared from the market.

Modern logwood and chromium inks consist of a combination of extract of logwood, bi-chromate of potash, and, at times, sulphate of iron

or some other metallic salt combined in a manner unknown to the writer, the manner of combination being a trade secret jealously guarded by the manufacturers.

This sort of ink is of a purplish black color, flows readily from the pen, is of good color and is a good sort of ink for ordinary purposes, but in my judgment has not the durability and permanency above ascribed to the nut-gall and iron inks. Therefore, the former are to be preferred for ordinary legal purposes.

Within the last few years several kinds of black ink have been put upon the market by manufacturers, consisting of an aqueous solution of the coal-tar colors known as nigrosine and induline. Inks made of these colors are of a bluish black appearance, flow readily from the pen, are not corrosive and are sufficiently permanent for ordinary purposes not connected with commercial or legal transactions, where the greatest power of endurance is required. The coloring matter, however, in this sort of ink lies upon the surface of the paper, is quite easily soluble by water and, therefore, quite objectionable for use on documents which are likely to become damp or wet, for the reason that wetting the same will cause the colors to run and deface the paper.

The various red, violet and other colored inks upon the market, almost without exception, consist of an aqueous solution of some one of the many coal-tar colors. They are very brilliant, sufficiently durable for the purposes for which they are used, flow readily from the pen, and are, upon the whole, very good inks and much more brilliant and pleasant to the eye than the older sort of inks manufactured from carmine which is the coloring matter of cochineal.

Carbon inks are the most ancient and most durable of any of the inks herein described. They consist of carbon in the form of lamp-black in a very minute state of sub-division held in suspension in some suitable medium.

I do not here refer to India inks which are so much used by draughtsmen, nor to printing ink, but to the various sorts called "safety inks" sometimes used in banks in writing checks and other similar documents. While these inks are more permanent than any of the others above referred to, their liability to become muddy and to deposit sediment renders them unpopular for ordinary use, and they will probably for that reason never come into general use and will in practice be met with only in exceptional cases.

With respect to the identification of ink upon a written document, which is oftentimes a question of very great importance, it is to be observed that chemical tests of ink upon paper present unusual difficulties for the reason, first, that the reaction of any re-agent applied to the instrument may be modified by some constituent of the paper with which the ink has combined after the writing was made. Again, courts will not ordinarily allow any application to be made to any document in evidence in the cause which will deface the same or have a tendency to destroy its

identity. All that will be allowed in such cases ordinarily is the application of a minute drop of the re-agent to some selected portion of a letter or mark upon the document. Notwithstanding these limitations, however, it is ordinarily not difficult to identify the inks in common use for the period of the last thirty or forty years by the use of simple and well-known re-agents which will readily suggest themselves to a competent chemist who has studied the question experimentally with a sufficient degree of care. It may be necessary in cases, in order to exclude doubt, to apply confirmatory tests to other letters, but this is ordinarily unnecessary. To give the details of such chemical tests would require too much space, and would probably be uninteresting to readers. Their substance may be found in any work on analytical chemistry. The question is sometimes presented in the form of an inquiry as to which of two portions of a writing,—an interlineation, for instance—was made first. A knowledge of the chronology of inks will oftentimes enable an expert to solve this question with a great degree of certainty, but where the question presented involves simply the age of a writing,—although it is ordinarily possible to distinguish one freshly written from one several years old,—there is at the present time, in my judgment, no means known to science by which such age can be even approximately ascertained. There are so many unknown factors in the problem consisting of unknown reactions of the ink with the paper, the unknown conditions to which the paper has been subjected since the writing was made, and other circumstances which readily suggest themselves, that it is not possible to subject the problem to control tests so as to answer the question with even a reasonable degree of certainty.

The question not infrequently arises as to which of two portions of a writing intersecting each other was made first. One would suppose that this problem could be easily solved, but a long series of experiments has satisfied me that while in a majority of instances the mark last made will appear to lie over the one first made, still in a very considerable minority of cases this appearance is reversed, so that the probability of an expert's being able correctly to answer the question proposed, is not very great.

Besides the chemical tests above referred to, for some years past it has been the practice of many experts to give an opinion as to the kind of ink upon the paper by an observation of it through a compound microscope. This question arose in the great Davis will case now pending in the District Court of Silver Bow County, Montana, and also in the Dempsey will case recently pending in Hackensack, New Jersey, but I believe since compromised. The result of the chemical tests in those cases was such as to demonstrate beyond peradventure, the utter fallacy of any such claim, and, in my judgment, it is impossible, by a mere microscopic examination of a writing, to determine the character of the ink. A mere naked eye inspection, or an inspection with a watch-maker's glass, of an ink recently written will frequently enable one to express an opinion entitled to some

weight as to certain kinds of ink, especially nut-gall and iron inks and some of the red coal tar color inks. But after a black ink has attained any degree of age the expression of such an opinion would be very hazardous.

It will be observed from the above statement that in the identification of ink, reliance must chiefly be placed upon chemical tests; and with respect to black inks, such as are ordinarily used upon legal documents, a chemical test usually answers every purpose.

The writer is investigating the subject of the identification of the various colored inks, but the investigation has not yet reached such a stage as to warrant its publication. This will be reserved for some future article.

97 Clark St., Chicago, Ill.

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE, Editor and Business Manager.

H. D. JEWELL,

Managing Editors.

ELI R. SUTTON.

ASSISTANT EDITORS.

J. E. ROBERTS,
ARTHUR WEBSTER,

W. M. HARVEY,
O. B. VANHORN.

Published monthly, during the college year, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

IT IS customary in the initial number of a new magazine to define its policy, to outline the ideas of the editors as to the field it is expected to cover, and to announce the objects of its publication. The MICHIGAN LAW JOURNAL, we believe, does not tread upon the territory which legitimately belongs to any other college or professional publication in the State of Michigan. It occupies an entirely new field in journalism at the University. In fact, it is not strictly a student publication, inasmuch as the burden of its contents is composed of articles from the pens of lawyers and jurists who are especially qualified for this kind of work. The Faculty of the law school take an interest in it, and have a general supervision over it, which is, in itself, a guarantee that its contents will be of a high standard. It is the aim of the editors, with the advice and assistance of the law Faculty, to make the JOURNAL of interest and value to both the student and the practicing lawyer. There will be special departments and articles by the law professors which are intended particularly for the student. The contributions by legal specialists and eminent lawyers, and the digests of the opinions of courts of last resort, particularly of the State of Michigan, are intended to be of practical value to the practicing lawyer. We trust that the students of the law school, the alumni of the law department of the University, and the profession generally will give the new JOURNAL their support. We wish, here, to thank those, among the alumni, who have written us letters of encouragement, and have so kindly proffered their services. With so many friends at the start, there would seem to be no reason why the new periodical should not prove worthy of the law school and the University from which it is issued.

A CASE now before the English courts is attracting considerable attention on the continent, and in it a very nice question is involved. An English subject, leaving his family in London, went to Naples. While there he was captivated by the charms of an Italian woman, and upon his representations that he was a single man, she was persuaded to follow him to the altar. He was subsequently informed that his English wife died on the day of his second marriage. Much relieved by this news he returned to London. It was found, however, that taking into consideration the difference in time between London and Naples, the second marriage occurred a few minutes before his first wife's death, and that, by this calculation, he had been the husband of two wives for *twenty-three minutes*. He was accordingly arrested for bigamy; but whether or not he can be convicted under these circumstances remains to be decided. There would seem to be no reason why he should not be, as all the elements which make up that crime appear to be present in this case.

It is surprising to note the rapid increase of contested will cases, and still more surprising to observe the large number of wills which have recently come before the courts, in which fatal flaws have been found. Either the courts are becoming extremely technical in their requirements, or else the members of the bar are exceedingly careless in the performance of this important duty. The latter is probably the case. Were it not for the amicable settlements which are often effected, this class of litigation would no doubt be much greater than at present. Examples may be found in the well-known Ogden will case, and the great Tilden will contest, both recently decided. By the decision of Justice Patterson, in the former case, Northwestern University was deprived of a considerable bequest. In the latter case it was developed that so great a lawyer as Samuel J. Tilden, who could unravel the most intricate complication in the business affairs of a gigantic corporation, could not (or at least did not), draw a will capable of carrying out his intentions.

In defense of the bar in this connection, it may perhaps be said, that very many of its members are so engrossed in the duties of other branches of the law that they have little, if any time to devote to probate practice. Again, it is a notorious fact that a lawyer takes far less pains with what he does for himself than for his client, and as the flaws in the lawyer's will are more closely noted, and controversies over it attract the most attention, there may not be as much litigation, relatively, on the subject as there seems to be.

It will be inferred from the articles in this number by Hon. Thomas M. Cooley and ex-Congressman Byron M. Cutcheon, upon the history and constitutionality of choosing presidential electors by districts, that the JOURNAL proposes to present a thorough discussion of this question to its readers, particularly from a legal point of view. It is our intention to submit arguments upon both sides of the question, from the pens of those who are the most thoroughly qualified to write upon it. It is a question that is occupying the attention of the leaders of both of the great political parties of the country, for, if the scheme of the Miner electoral law is put into effect generally throughout the United States, the results are bound to be far-reaching politically. President Harrison deemed the question of sufficient importance to give it extended discussion in his message to the present Congress, and the newspapers of all shades of political belief have argued for and against it, taking as their text, the

iniquity and unconstitutionality, or, on the other hand, the justice and constitutionality of what is termed "Michiganizing."

The article by Judge Cooley in this number is more strictly a history of the methods of appointing presidential electors, and, while it is not an argument either for or against the selection of presidential electors by congressional districts, it contains an exhaustive discussion of all the historical facts bearing upon the question, and is therefore an especially valuable contribution. The article by Hon. Byron M. Cutcheon is a presentation of the argument against the constitutionality of the Miner electoral law, and is written by one who is particularly qualified, by a thorough study of the constitutional question involved, to pronounce an opinion. In the March number of the JOURNAL, there will appear a discussion of this question from the standpoint of one who believes in the constitutionality of the law.

As a rule, lawyers are not so likely to devote all their reading to their own particular line of work as men in other professions, yet there is a tendency even among many in this the most liberal profession, to over application. A few lawyers say that the law student should read nothing but law, but no very great lawyer would give such advice. Judge Cooley in his "Suggestions for the Study of the Law" quotes approvingly from Randall's Life of Jefferson, a program which Jefferson is said to have followed, viz.: "Till eight o'clock, to the natural sciences, ethics, religion and natural law; eight to twelve, technical law; twelve to one, government, politics, and political economy; after dinner, history; from dark to bedtime, belles-lettres, criticism, rhetoric, and oratory."

Story, Choate, Ingersoll, and Conkling each recommends that the student give but six hours daily to legal study, and four to other. Passages in point might be selected from the writings of almost all great jurists which would establish the position were we attempting an argument, which we are not. Our object is rather to call attention to a tendency to study nothing outside of one's own profession, a tendency, which if it develops into habit destroys all power of liberal thought. The lawyer meets daily, men from all walks of life, hence there is presented to him the possibility of a most varied culture, but if he has been narrowed by constant and habitual thinking in but one channel, he can never appreciate the relation he himself sustains to the great truths developing about him, much less unravel the intricacies of life for others. A university presents a golden opportunity to the student of law to gather a few gems from the mines of wisdom in other departments of learning, which may illumine some otherwise dark corners of his mind. A consensus of the opinions of great and liberal minds would show that, judging by experience, a law student can learn more law by studying law six hours per day, and other subjects, such as the sciences, the remainder of the time, than to study law ten hours per day; and what is said of law applies equally to the devotees of any profession. Too constant application enervates the mind, rendering it incapable of consecutive thought, but a change of work is a rest.

CAN LECTURES BE PRINTED AND DISTRIBUTED FOR PROFIT?—One or two nice questions of law are involved in the recent unpleasantness in the law school over printed lectures. The first and most important is, of course, whether or not there is any legal right to print and publish lectures delivered under such circumstances. The question has been before the courts several times. Two quite early cases, *Abernethy v.*

Hutchinson, 3 L. J. Ch., 209, and *Nichols v. Pitman*, 26 Ch. Div., 374, held, that "a person who addresses an audience has a right to determine the terms on which he communicates his information, and may in general make it part of these terms that the information given shall not be printed and sold without his permission." The leading case on the question is undoubtedly *Caird v. Sime*, 12 App. Cas., 326. The plaintiff was the professor of moral philosophy in the University of Glasgow, and brought his action against the defendant for publishing reproductions of his lectures. The defendant claimed that the delivery of the lectures in the class-room of the university was equivalent to a publication and that the professor had consequently lost his right to prevent their publication in a printed form. This view was sustained by the Court of Session, and the decision created considerable stir for a time. A writer commenting upon it in the *Law Quarterly Review* for January, 1886, says: "As things now stand, no lawyer at Oxford, Cambridge, Dublin, or Edinburgh can deliver expositions like Blackstone's without the risk of finding his work spoilt, and his prospects of fame and public utility ruined, through the premature publication of his addresses by any student who has been sharp enough to learn shorthand." The case was appealed to the House of Lords in 1887. The counsel for the respondent argued that any man was entitled to matriculate in the university, and demand admission to the professor's lectures, on payment of the fee fixed by the university authorities. That the students attended the lectures in the exercise of a public right, and that from the time of delivery the lectures became public. That if it was admitted that the students might read, repeat, or lend copies of the lectures to others, then reproduction on a large scale and for profit could make no difference in principle. With this view Lord Fitz Gerald coincided, but the balance of the court held that, "A professor of a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world, so as to entitle anyone to republish them without the permission of the author." The *Law Quarterly Review* for October, 1887, thus tells of an amusing incident which occurred shortly before this case was finally decided: "While this case was under appeal, a curious incident took place in the University of Edinburgh. Several students subscribed a fellow student's fees for a course, on condition that he, being cunning in shorthand, should take verbatim notes and give a copy to each of the subscribers. This notable device was detected; a compromise was made, but now we may suppose that such conduct would meet with severer notice."

The final decision in this case seems to be the great weight of authority in this country. Such lectures are regarded as public only for the purposes of the university. The author is not regarded as dedicating his manuscript to the public by using it to instruct others; and even if he permits his pupils to make complete copies, it is held that they can not use it for publication; the intentions of the owner of the manuscript cannot be perverted or extended. *Bartlette v. Crittenden*, 4 McLean, 300; *Tompkins v. Halleck*, 133 Mass., 15; 43 Am. Rep., 492; *French v. Conelly*, 43 Am. Rep., 493 note; *Palmer v. DeWitt* 47 N. Y., 532; S. C., 7 Am. Rep., 480; S. C., 32 N. Y. Super., 559.

While the law on the subject seems to be pretty well settled, this has no bearing on the question as to the policy which should be pursued by the law Faculty in determining what is the best method of imparting instruction.

LECTURE NOTES.

OUTLINE OF LECTURES ON ADMINISTRATION.—PROF. ABBOTT.

The answer to the question, how is the property of a deceased person to be disposed of, resolves itself into the consideration of these points:

1. Who decides the question, or tribunals that determine the devolution of property after death of the owner.
2. The officers who carry into effect the decrees of these tribunals; or
 - (a) Executors,
 - (b) Administrators.
3. Where did the deceased reside, or leave property, when he died, or Jurisdiction and Administration;
 - (a) Domiciliary,
 - (b) Ancillary.
4. What property did he leave;
 - (a) Real,
 - (b) Personal.

[Incidental to 3 and 4: of the Conflict of Laws in Administration.]

5. Who have claims on the property;
 - (a) Husband or Wife,
 - (b) Heir or next of kin,
 - (c) Devisees or Legatees,
 - (d) Creditors.
6. Did he legally declare who should have his property, or did he die;
 - (a) Testate,
 - (b) Intestate.
7. Procedure;
 - (a) Application for appointment of administrator or executor,
 - (b) Citation,
 - (c) Probate of Will,
 - (d) Bond,
 - (e) Letters of appointment.

[Incidentally of Appeals.]

- (f) Inventory,
 - (g) Collection of assets,
 - (h) Payment of debts,
 - (i) Payment of legacies—or Distribution.
 - If there be not sufficient assets,
 - (j) Sale of real estate to pay debts if the estate be insolvent,
 - (k) Representation of insolvency, payment of debts pro tanto,
 - (l) Accounting.
8. Descent of real estate.

LATE DECISIONS OF THE MICHIGAN SUPREME COURT.

SHIPPEY V. SUPERVISORS OF AU SABLE.—Decided Jan. 22.—(Per Curiam.)

Mandamus to compel respondents to assess amount of judgment, interest and costs, upon assessment and tax rolls. *Held*, that it is not necessary that the Common Council shall authorize the assessment of the judgment; that the Board of Supervisors cannot by neglect or refusal to act upon the assessment of a judgment, defeat or defer its collection, and that it is their duty to apportion the same among the wards of the city.

IN THE MATTER OF SARAH JONES JORDAN.—Decided Jan. 22.—(Per Curiam.)

A "vagrant" is a disorderly person, under the statutes, but persons having no visible calling or business to maintain themselves are not "disorderly persons". Neither will "sleeping in a barn one night and going about the township from place to place for eight days, without any visible means of support" of itself constitute vagrancy; it must further appear that the person is idle, and seeking to live upon the charity of others, unwilling, though able to do so, to work for his or her maintenance.

FELKER, Administrator, v. CHUBB.—Decided Jan. 22.—(Grant, J.)

Bill in Equity—Fraudulent Conveyance—Intent to Defraud.—Bill filed to recover, for benefit of creditors, certain real estate alleged to have been fraudulently conveyed by A. L. Chubb, to the defendant, his wife. The conveyances were made without adequate consideration but no intent to defraud was apparent. *Held*, that if the conveyances were made without adequate consideration, and the effect was in fact to defraud creditors, the conveyances will be set aside though no actual intent to defraud appear.

PARTLOW V. SWIGART.—Decided Jan. 22.—(Morse, Ch. J.)

Replevin—Attachment—Bona Fide Sale.—Plaintiff brings action of replevin for a stock of goods, claimed to have been bought in good faith of his brother, but which defendant, sheriff, holds by writ of attachment sued out by creditors. *Held*, that if the plaintiff took the goods in payment of an honest debt, and with no fraudulent intent, he could recover, provided also, that his bill of sale was taken as an absolute conveyance, and the value of the goods did not exceed, to any considerable amount, the debt justly due to plaintiff from his brother.

The exclusion of evidence that orders for goods were given after agreement to sell the stock to his brother, was held not to be a fatal error.

JARVIS V. FOX, et. al.—Decided Jan. 22.—(McGrath, J.)

Defendants, husband and wife, executed and delivered to plaintiff a deed of land occupied as homestead. Complainant delivered back a bond to reconvey on payment of \$4,000, and seven per cent. interest, payable annually. Agreement was at same time entered into between husband and complainant whereby the property was leased to the defendants at an annual rental. Some days later a note was given by husband to complainant at his request that he might have evidence of the principal indebtedness, and was dated back to the time the indebtedness originated. The note made no provision for annual interest. But it was held that the whole was one transaction constituting a mortgage and that the interest should be paid annually according to the terms of the bond.

BLACK V. DELBRIDGE, BROOKS & FISHER COMPANY.—Decided Jan. 22.—(Montgomery, J.)

Assumpsit—Verbal Contract—Evidence—Acceptance.—Plaintiffs bring action to recover price of birch lumber sold on verbal contract, the terms of which were in controversy. Plaintiff claims that lumber was received and accepted and gave evidence to establish this claim. Defendants claim that lumber was not of the grades contracted for, and was never in fact accepted. *Held*, that evidence is

admissible to show that lumber did not come up to grades contracted for, for the purpose of corroborating defendants' claim that there was no acceptance in fact. The mere receipt of the lumber, into defendants' possession does not amount to an acceptance; the plaintiff must show not only the receipt but an acceptance after the receipt. (Cited, *Remick v. Sandford*, 120 Mass., 301; *Benj on Sales*, 152; *Henkle v. Welsh*, 41 Mich., 665). It is incumbent upon the plaintiff to show an acceptance at some time prior to commencement of the suit.

RAWLEY V. COLLIAU.—*Decided Jan. 22.*—(Morse, Ch. J.)

Negligence—Injury by Fellow-Servant.—Plaintiff was employed in defendant's blacksmith shop and was injured by chip of iron flying from hammer in hands of a fellow-servant, striking plaintiff in the eye, destroying his sight. Action for damages. *Held*, that though the hammer used may have been defective, yet the defendants were not negligent in allowing it to remain in the shop when there were others that were sound and in fit and safe condition for use, and when neither plaintiff nor any of his fellow-employees were obliged or directed by defendants to use that particular hammer in their work. The negligence of his fellow-servant in using the hammer does not render the defendants liable, unless they can be held negligent for permitting the hammer to be in the shop in an unsafe condition. (Cited, *Hefferen v. N. P. R'y. Co.*, 48 N. W. Rep., 1.)

CHAPPELL V. BARKLEY.—*Decided Jan. 22.*—(McGrath, J.)

Professional Services—Verbal Promise to Pay Debt of Another.—Plaintiff was the attending physician during last sickness of defendant's father. His professional services began Feb. 9, 1889, and continued until March 25, 1889. On March 11, 1889, defendant said to plaintiff, "You do what you can for father, and you charge this bill to me, and what you do afterwards, and I will leave you some money before I leave town." To this plaintiff assented. The bill for services rendered up to that date was \$27.00. Subsequent to the conversation services amounting to \$16.00 were rendered. *Held*, that the amount due March 11th, was the debt of the father, and that defendant's promise so far as respects the \$27.00, at that time charged, was a mere naked verbal promise to pay the debt of another and no liability can be predicated upon such a promise, and judgment must be for the amount due for services rendered after the agreement only.

WILHELM V. FAGAN, Supervisor.—*Decided Jan. 22.*—(McGrath, J.)

Application for mandamus to compel the supervisor of Holly Township to sign a warrant for the purchase of a site for a town hall. *Held*, that the proceeding, not being on behalf of the township to compel one of its officers to comply with an order made by the town board, but instituted by a stranger to compel a supervisor to sign a warrant in favor of such stranger, in order to entitle the relators to the relief sought, they must show the existence of a valid and binding executory contract, or a contract executed so far as the relators are concerned. It is not enough that the township passed a resolution accepting the deed, provided the instrument itself was not to be actually delivered to the township until the warrant was drawn, and the money paid over. Until that is done there is nothing to prevent the relators from refusing to perform. The intention of the grantee alone is not sufficient to vest the title in the township and the intention of the grantor is not to be sought for in a resolution passed by the grantee. Mandamus was therefore denied.

JANDORF V. PATTERSON, et. al.—*Decided Jan. 22.*—(McGrath, J.)

Bill in Equity—Fraud—Parties to Fraud—Reconveyance.—Complainant was an industrious baker who had saved up \$500. He was induced by defendant Patterson, a real estate broker, to join in the purchase of certain property of defendant Stone for \$7,000 on Patterson's representation that it was cheap at that price. Jandorf did not know Stone, and Patterson made all the arrangements for the purchase. Jandorf was to pay \$500 in cash and Patterson agreed to pay \$1,100 of the purchase money, making \$1,600 in all; the balance to be secured by mortgage. Jandorf agreed to give his personal note to Stone for \$400, and to Patterson for \$100. Patterson had made a previous arrangement with Stone to find a purchaser for the property at \$6,000, and to receive a commission of \$150 for making the sale. In other words Stone agreed to take \$5,850 net for the property. Patterson desired the purchase price to appear to be \$7,000 and Stone assisted in this by taking from Patterson, on the day of sale, a check for \$1,100, and putting it in his pocket in Jandorf's presence. Jandorf and Patterson then gave a joint mortgage for \$5,000. Stone had by this deal received \$5,900 besides Patterson's check. In Jandorf's ab-

sence he returned Patterson's check for \$1,100 and gave him \$50 cash. Jandorf subsequently paid his \$100 note to Patterson, so that by the arrangement Patterson acquired a half interest in the property, and \$150 without paying a cent towards the purchase money. As soon as Jandorf discovered the fraud he filed a bill to set aside the deed and mortgage and compel defendants to refund the amount paid by him. *Held*, that Stone had by his actions assisted in the fraud, and could not complain if the decree restored to him what he had conveyed, if complainant had not dealt with the land as his own after the discovery of the fraud; and it is not necessary that the complainant should reconvey before the bill was filed.

JOHN C. ROEMER, Relator, v. BOARD OF CITY CANVASSERS, DETROIT, Respondent.
—*Decided Jan. 22.*—(Montgomery, J.)

Mandamus to Compel Recount of Votes—Second Return by Inspectors—Adequate Remedy.—It is the plain duty of the common council, on the request of either party, to order a recount of the ballots cast in a voting district and seat the person having the highest number of votes. After the inspectors of election of a voting district have made a canvass of the votes, publicly announced the result, prepared and signed a return, and filed the same with City Clerk, a second return should be treated as a nullity and the canvassing board have no right to accept or act upon such second return. When the inspectors have completed their count and executed and delivered the returns, their legal powers are ended, and any attempt on the part of the inspectors to change or modify such original returns in any particular, involving any other than a mere clerical duty, is clearly beyond their powers. The relator should not be compelled to resort to a contest before the common council; such a remedy is manifestly inadequate. (Cited, *Keeler v. Robertson*, 27 Mich., 116; *Coll v. Board of Canvassers*, 83 Mich., 367.)

PALMER v. JACKSON CIRCUIT JUDGE.—*Decided Jan. 20.*—(Per Curiam.)

Mandamus—Probate Practice—Appeal to Circuit Court—Written Examination.—The relator, one of the heirs at law of Rebecca Palmer, petitioned the Probate Judge to cite Annie Campbell to appear before the court and submit to an examination touching effects of the estate in her hands, under §§ 5876, 5877 How. Stat. The parties appeared in Probate Court and Mrs. Campbell offered to answer in writing any written interrogatories propounded, but the Judge made an order requiring her to submit to an oral examination. Appeal taken to Circuit Court. Relator moved to dismiss appeal on ground that the order was not appealable. Motion was denied and application made for mandamus to compel Circuit Judge to dismiss the appeal. *Held*, that the order was not appealable. (Cited, *Walker v. Hull*, 35 Mich., 488; *Moore v. Moore*, 48 Mich., 271; *Goss v. Stone*, 63 Mich., 319.) But the order made by the Probate Judge was also unauthorized. The interrogatories and answers must be in writing, and it is not sufficient to reduce the testimony to writing as the examination proceeds. (Cited, *Martin v. Clapp*, 99 Mass., 470.)

GRAND LODGE v. NOLL.—*Decided, Jan. 22.*—(Montgomery, J.)

Bill of Interpleader—Beneficiary Order—By-laws—Change of Beneficiary—Loss of Certificate—Disposition by Will.—Bill of interpleader between defendants Michael Noll and Christine Noll to determine who entitled to insurance money. Jacob Noll, son of Michael Noll, and husband of Christine Noll, became a member of the A. O. U. W., and received a certificate entitling to participate in beneficiary fund to the amount of \$2,000, containing the provision, "This certificate is issued upon the express condition that said Jacob Noll shall in every particular, while a member of said order, comply with all the laws, rules and requirements thereof." The by-laws provided that a change of beneficiary should be made in writing on the back of the certificate. The certificate became lost and Jacob Noll, desiring to make a change in the beneficiary, made a will bequeathing the insurance money to Michael Noll instead of to Christine Noll, the beneficiary named in the certificate. *Held* to be a good disposition. The certificate having been lost or mislaid without fault of the assured, it is therefore impossible for him to name a new beneficiary in the manner prescribed by the by-laws, but a court of equity can and should recognize the disposition by will. (Cited, *Grand Lodge v. Childs*, 70 Mich., 163. The case of *Supreme Lodge K. of H. v. Nairn*, 60 Mich., 54, criticised.)

SAUERS v. GIDDINGS.—*Decided Jan. 22.*—(Montgomery, J.)

Ejectment—Records as Evidence—Adverse Possession—Instructions to Jury.—How. St., § 5,678, provides in effect that in case of deeds executed by executor, administrator or sheriff, the deed itself, the record, or a certified copy of the record, shall be *prima facie* evidence of the regularity of all proceedings required by law

anterior to such deed; and the title to the act is sufficiently broad to include existing records as well as those thereafter to be made. To show adverse possession, it is not necessary that premises should be enclosed by a fence, or that when a fence is used it should be of any particular kind. (Cited, *Greene v. Anglemire*, 77 Mich., 171; *Beecher v. Calvin*, 71 Mich., 395; *Murray v. Hudson*, 63 Mich., 674; *Hughes v. Anderson*, 79 Ala., 214.) And an instruction to the jury by the Circuit Judge that "The party who enters without color of title, and who relies on adverse possession only as a defense against the legal title, must show a substantial enclosure and actual occupancy which is definite, positive and notorious, in order to overcome the legal title," is a misleading instruction. It should be left to the jury to say whether the occupancy was practically continuous, exclusive and hostile, and intended to be such by the defendant; and evidence that a portion of the lands in question were assessed to the defendants is admissible as tending to show adverse possession. (Cited, *Murray v. Hudson*, 63 Mich., 679; *Raynor v. Lee*, 20 Mich., 387.)

TOWNSHIP OF FRUITPORT, Relator, v. MUSKEGON CIRCUIT JUDGE, Respondent.—
Decided Jan. 22, (Montgomery, J.)

Mandamus—Justice's Docket—Validity of Justice's Judgment—Sufficiency of Execution—Affidavit for Warrant—Supervisor of Fruitport Township caused arrest of S. L. Torrence and E. Torrence for trespass on township property. Judgment awarded to plaintiff in justice's court, and body execution issued. Defendants sued out writ of habeas corpus accompanied by common law certiorari from Muskegon Circuit Court, and were discharged by Circuit Judge on the grounds that affidavits upon which warrant issued were insufficient to confer jurisdiction; that the justice's judgment was void because docket failed to show that plaintiff's attorneys proved their authority to appear, and because *hour* of appearance was not entered. *Held*, error on part of Circuit Judge and writ of mandamus issued.

Held, also, that: (1.) The validity of justice's judgment can not be assailed collaterally because the docket fails to show authority of plaintiff's attorneys to appear (Cited, *Mayhew v. Snell*, 38 Mich., 182; *Reed v. Gage*, 33 Mich., 180). (2.) The time when the parties appeared before the justice must be entered upon the docket, and also the hour of adjournment in order that it may appear that the appearance of the parties was within the time authorized by statute; but the failure to note on the docket the *hour* of appearance is not a fatal error. (Cited, *Redman v. White*, 25 Mich., 523; *Midge v. Yapples*, 58 Mich., 307.) (3.) An execution is sufficient, though it contains no recital that the suit before the justice was commenced by warrant, or that the judgment was rendered in an action of tort. (*Tiffany's Justices' Guide*, 498). (4.) An affidavit which states that a party "is the agent of said township, and makes this affidavit in behalf of said township," and which positively states that the township has been the owner in fee of the land in question for more than ten years past, is sufficient to show authority to make such affidavit in behalf of the township, and to establish the ownership of the real estate.

RECENT DECISIONS.

ASSOCIATIONS—FORFEITURE OF PROPERTY, BY CONSTITUTION AND BY-LAWS.

—The constitution and by-laws of the Knights of Labor, providing that on suspension of a local assembly, its property shall be forfeited, and vest in the secretary of the general assembly, are void, in that they seek to confiscate, without judicial process, property which is not derived from the general assembly, but is held and owned by the local assembly absolutely. *Austin v. Searing*, 16 N. Y., 112, followed. *Wicks v. Monihan*, 29 N. E. Rep., 139. (N. Y. Ct. App.)

CARRIERS—EJECTION OF A PASSENGER.—Railroad Co. had advertised to run an excursion on a certain day, giving schedule of fare from various stations. The plaintiff got on board, at a station where no tickets were sold. He paid the conductor more than the excursion rate, for the round trip, and took the conductor's receipt. On the return trip the same conductor demanded a return fare, and on the refusal to pay, the plaintiff was ejected from the train. *Held*, that plaintiff had complied sufficiently with defendant's regulations to entitle him to the special excursion rate, and the fact that the trespass took place on Sunday, is no defense, since the action was not based on the breach of a contract, but on the violation of a personal right. *Chicago, St. L. & P. R. Co. v. Graham*, 29 N. E. Rep. 170. (Ind. App.)

CARRIERS—OPINION EVIDENCE.—RECOVERY FOR SHRINKAGE OF CATTLE.—Where cattle are shipped by railroad from Texas to Chicago, Ill., and sustain shrinkage, due to a delay caused by a wreck, the court *held* that a witness who has had large experience in shipping cattle from such point in Texas to Chicago, could properly give his opinion as to the loss of cattle in weight by reason of the delay, etc. Also, that a provision in a contract with a carrier, to limit the carrier's damages in case of loss or partial loss, etc., can not affect the shipper's right to recover the true value, if loss is caused by carrier's negligence. Also that the shipper is entitled to recover the difference in the state of the market at the time the cattle are, and the time the cattle should be delivered, and the shrinkage in weights. *Ft. Worth & D. C. R. R. Co. vs. Greathouse*, 17 S. W. Rep., 834. (Tex.)

CONSTITUTIONAL LAW—WRITS OF ERROR IN CRIMINAL CASES—TITLES OF ACTS.—Where an indictment in St. Louis court of criminal correction was quashed on ground that the law under which it was drawn was unconstitutional, *held*, that such decision might be reviewed on writ of error on behalf of the state. Also that an act entitled, "An Act to prohibit book-making and pool selling, etc.," is not unconstitutional, as containing more than one subject, and is within the police power of the state. *State v. Burgoerfer*, 17 S. W. Rep., 646. (Mo.)

CONSTITUTIONAL LAW—INTER-STATE COMMERCE—TAX UPON A R. R. FRANCHISE.—*Held*, by a majority of the court that an act, passed by the legislature of the State of Maine, providing for an excise to be raised by taxing railroad corporations for the privilege of exercising their franchises within the state, was not a regulation of inter-state commerce, and hence in its application to railroads which enter the state from another state or from Canada, the act does not operate in violation of the Federal Constitution. *State of Maine v. Grand Trunk R. Co.*, 12 Sup. Ct. Rep. (U. S.) 121.

CHINESE—EXCLUSION ACT—CHINESE MERCHANT—CERTIORARI.—By the treaty with China in 1868, all Chinese subjects were guaranteed the right, without conditions or restrictions, to enjoy all the privileges, immunities and exemptions enjoyed by citizens of the most favored nation. The treaty of November 17, 1880, put no limitation upon this right so far as Chinese other than laborers were concerned. The Acts of Congress in 1882 and 1884 provide that every Chinaman domiciled in the U. S. upon leaving must obtain a certificate of permission to re-enter. Where a Chinese merchant, domiciled here for 17 years, and having an established business of \$100,000 a year left U. S. for a visit to China, question arose as to whether he should present a certificate to collector before he is allowed to enter. The precise question not being before the court it was left undecided, but it was intimated that a different construction might be given to the statute, taken with the treaties. Writ of certiorari was issued to Circuit Court of Appeals. *Ex parte Lau Ow Bew*. 12 Sup. Ct. Rep. (U. S.) 43.

DISCOVERY—PHYSICAL EXAMINATION OF PLAINTIFF.—Where a motion was filed by the defendant to require the plaintiff to submit to a physical examination by medical experts, the court held that in the absence of satisfactory proof that the due administration of justice requires such action, for furnishing reliable and satisfactory evidence of the nature, extent and permanency of the injury complained of, that such motion will be denied. *St. Louis Bridge Co. v. Muller*, 28 N. E. Rep., 1091. (Ill.)

ELEVATED RAILROADS—DAMAGES FOR INJURY TO ADJACENT PROPERTY—SURVIVAL OF RIGHT OF ACTION.—Where the construction of an elevated R. R. so injured adjacent property as to reduce the rental value thereof, and impairs the easements of abutting owners in the streets; *held*, that the owners of the fee, are entitled to recover damages, notwithstanding the property may be leased, at the time of damage, for a term of years. *Held*, also that, upon the death of such owner, intestate, the right of action for damages accruing after his death, vests in his heirs, instead of his administrator. *Kernochan et al v. N. Y. Elev. R. Co.*, 29 N. E. Rep., 66, and three cases following. (N. Y. App.)

FRAUD—FRAUDULENT CONVEYANCES—VOID AS AGAINST CREDITORS.—A debtor being insolvent executed a deed of trust conveying his entire property, consisting of a stock of merchandise, to secure an indebtedness due a certain creditor. By the deed, the trustee was to have possession, and "sell the property in due course of trade," for the creditor named, the residue, after paying this creditor's claim, to be returned to the grantor. The property thus conveyed greatly exceeded the amount due. *Held*, that as trustee was not allowed to sell promptly, and the surplus was thus placed for an indefinite time beyond the reach of the other creditors, the deed was void. *Gregg v. Cleveland*, 17 S. W. Rep., 777. (Tex.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHT OF HUSBAND TO MORTGAGE.—A husband has the right to mortgage the community property of himself and wife, both before and after the wife's death, and without regard to her concurrence. *McKinney v. Munn*, 17 S. W. Rep., 516. (Tex.)

INTOXICATING LIQUORS—LICENSE—WHEN NECESSARY—SOCIAL CLUBS.—Where a social club purchases liquors in large quantities, and retails them to its members who, on receipt thereof, sign a ticket with the cost price thereon, which tickets are paid monthly, but the members having the privilege of paying cash at the time they get the liquor, such sales are within the provisions of a city ordinance requiring a license to be paid by places in the city where liquors are retailed. *Kentucky Club and University Club v. City of Louisville*, 17 S. W. Rep., 743. (Ky. App.)

MASTER AND SERVANT—EVIDENCE OF CUSTOM—COMPARATIVE NEGLIGENCE—FELLOW SERVANT.—In an action for personal injuries, caused by the negligence of defendant's employees; *held*, that evidence as to custom of switching, or as to whether the cars were before or behind the engine is irrelevant, but that it is relevant for a witness to state whether or not it is the custom of laborers to look out for the movement of cars on which they are working. Also, that it is proper to submit the question of comparative negligence to the jury, when the evidence tends to show gross negligence by the defendant. *Held*, also, that one whose duty it is to unload cars in the yard of a rolling mill is not a fellow servant of one whose duty it is to have charge of the moving trains in the yard. *North Chicago Rolling-Mill Co. v. Johnson*, 29 N. E. Rep., 186. (Ill.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—VAULT UNDER SIDE-WALK.—An owner of a city lot, with the consent of the city authorities, constructed a vault under the side-walk in front of his lot. *Held*, that the municipal authorities were liable and not the owner, for injuries sustained by a person falling into the vault on account of the breaking of a flagstone over it, where no actual negligence of the lot owner is shown. Also that consent of city to the construction of such vault may be implied from nine years acquiescence. *Babbage v. Powers*, 29 N. E. Rep., 132. (N. Y. App.)

STATUTES—CONSTRUCTION OF AUSTRALIAN BALLOT LAW.—Contestant for the office of sheriff claimed that the ballot in the entire precinct of Sedalia, Mo., was invalid: (1) Because the official ballot prepared by the county clerk, and used at that precinct, contained (among others) the names of the nominees of the Union Labor party, and that that party had not polled the requisite three per cent. of the entire vote at the last previous election as required by statute; (2) That the votes were taken at two polling places, designated by the county clerk. At one poll the voters whose surnames began with letters "A" to "K" voted; at the other those with the letters L. to Z. The windows of the two polling booths were about seventy-five feet apart. *Held*, that in the first instance, the ballot law cannot infringe upon the right of suffrage; that such irregularities will not invalidate a ballot. *Bowers v. Smith*, 17 S. W. Rep., 761. (Mo.)

STREET RAILWAYS—SUPERIOR RIGHT OF WAY.—A horse street car at a street crossing has no superior right of way as against any vehicle driven upon the street, but it would seem that as regards their track they have a superior right in other places. *O'Neill v. Dry-Dock, E. B. & B. R. Co.*, 29 N. E. Rep., 84. (N. Y. App.)

USURY—NATIONAL BANKS—BONA FIDE DISCOUNTS.—*Held* that, under Rev. St. U. S. §5136, the purchase of a note from the payee, with latter's endorsement, is a purchase by discounting in the usual course of business, such as is authorized by statute, and is not a purchase by barter and sale, as would be the case if taken without indorsement or by indorsement without recourse. And where a national bank purchases a note at an usurious discount such purchase does not affect the title to the paper nor its negotiable character. *Nicholson et al v. Nat. Bank of New Castle*, 17 S. W. Rep., 627. (Ky. Ct. App.)

WILL—CONTRACT TO MAKE—ANTECEDENT DEBT.—A wife, while sick and in expectation of death gave back a note, *causa mortis*, which had been executed to her to secure the payment of money that was hers, to the husband. She recovered but never required the note to be returned to her, but permitted it to be destroyed with the understanding that he was to will her the value of the note in land in addition to what he had already devised her. He died without making the additional devise promised. *Held*, that his wife had the right to recover the value of the note from the deceased's personal representative. *Lisle v. Tribble*, 17 S. W. Rep., 742. (Ky. App.)

BOOK REVIEWS.

LEADING CASES UPON THE LAW OF TORTS.—Selected by George Chase, LL. B., Dean of the Faculty of the New York Law School.—St. Paul: West Publishing Company.

This collection of cases upon the law of torts, which has just reached its second edition, is used by the students of the New York Law School as a text book. It is particularly adapted to the needs of students. The aim of the compiler has been to select modern cases to a large extent, so that the student may become familiar with decisions which may be of practical value to him when he is admitted to the bar. The book is an excellent work for those who believe in object lessons, showing the application of legal principles, as a method of studying law. The selection of cases is a comprehensive one. The cases reported, 336 in number, are printed in the same general form in which they appear in the regular reports, viz., with head notes, statements of facts, and sometimes arguments of counsel, prefixed to the opinions.

R. S.

LEADING CASES SIMPLIFIED.—Professor John D. Lawson of the Missouri Law School. San Francisco: Bancroft-Whitney Company.

This work, of nearly 1,000 pages, is a very successful attempt to condense the leading cases of the common law, of equity and constitutional law, and of the criminal law, within the limits of a single volume. Professor Lawson, before the appearance of this volume, had published three books upon these subjects, which were received with such favor that he determined to include them in one volume at a price within the reach particularly of students. The decisions of the courts have multiplied so rapidly in state reports that students find it an impossibility to look to them for instruction in the principles of the law. The majority of the collections of leading cases now in use are voluminous, the individual cases extensively discussed, and the arrangement adapted more for the use of the practitioner than the student. Professor Lawson's cases, on the contrary, while completely covering the field, possess the virtue of brevity and simplicity. They are written in a style which renders it possible for the student to fix the principles in his mind readily. The cases are arranged in logical order, so that the law may be studied systematically. They are written in a semi-humorous vein, without sacrificing the facts and the law, and in fact are entertaining as well as instructive.

R. S.

VESTED RIGHTS.—Selected Cases and Notes on Retrospective and Arbitrary Legislation affecting Vested Rights of Property. By William G. Myer. St. Louis: The Gilbert Book Company.

This work is to be regarded as an eminently valuable addition to legal literature. In these days, when the many publishing houses are fairly groaning under their increasing burdens, it would seem strange if one book in twenty should be worthy the serious attention of a busy lawyer.

This volume is one of the few which will lighten, instead of increase, the burdens of an over-worked profession. To be learned in the principles of Vested Rights one must know what this book contains. He need not, of course, get it from this volume, for he can do as our author has done, read everything that sheds light upon this department of Constitutional Law, then digest and systematize. This plan, however, entails a great waste of time, and one must needs expend a life time to become proficient by such a method. Mr. Myer has succeeded in arranging all the law on this important but generally little understood subject, so as to be accessible not only to the student, but to the active practitioner. The book does not pretend to be a treatise, but rather a work of precedents, to which are appended elaborate, but carefully selected notes. Fifty-five leading cases are reported in full, and their application is illustrated by over 2,000 citations. The work treats of retrospective and arbitrary legislation, the limits of legislative power as regards property rights, and the constitutional guaranty of "due process of law." The work embraces 734 pages of reading matter, and the execution does credit to its publishers.

E. R. S.

A DICTIONARY OF LAW.—William C. Anderson of the Pittsburg bar-Chicago: T. H. Flood & Company, 1891.

The language of the law, like the language of other professions, is continually undergoing changes, alterations, and additions. Words, terms, and expressions are becoming obsolete and others are coming into use. Up to the time of the publication of Anderson's Dictionary, there was no work in existence which pretended to contain a complete vocabulary of *modern* legal words and terms. With the progress of Nineteenth Century civilization, new branches of the law have developed, new legal terms have been introduced and ancient terms have altered in meaning. There was a crying need for a work like that which Mr. Anderson has produced, not only for the student but particularly for the practitioner. In the preparation of Anderson's Dictionary, it is plainly evident that care has been taken not to follow in the "beaten path" of law dictionaries. It contains the different spellings of terms, the correct pronunciation of words often mispronounced, and the etymology or origin of all technical terms. The definitions are conveniently printed in the larger type, and the majority of them are framed by the courts, thus ensuring their accuracy and attaching to them the force of authority. References are made to useful articles in the law periodicals. A particularly interesting feature of the work are the brief biographies of law-writers and jurists. The dictionary is not only a vocabulary of words. It is a commentary or encyclopædia, and as such is principally valuable to the practicing lawyer. As a ready reference for students it is invaluable. It is in the best law-binding, in one large volume of 1145 pages, imperial octavo, and is a fine specimen of the publisher's art.

R. S.

A DICTIONARY OF LAW, Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern. By Henry Campbell Black, M. A. St. Paul: West Publishing Company.

This eminently durable and splendid edition of a book contains within its 1253 pages exact definitions of all the terms, phrases, and legal maxims essential to a minute knowledge of comparative jurisprudence. The typographical execution of a new book should be almost faultless, its

style should be clear and concise, its method judicious, all of which requirements are satisfied by the volume before us. Judges in their decisions are often loose in the use of terms, and to quote indiscriminately from their opinions mere matters of description, and to publish them as carefully formulated definitions, does a great injustice to the authority cited, and clouds instead of clearing the subject. Mr. Black in his Preface says that while "due prominence has also been given to definitions formulated by the appellate courts, . . . the aim has been to present a definition at once concise, comprehensive, accurate, and lucid," and he has "not felt bound to copy the language of the courts where, in any instance, in his judgment, a better definition could be found in treatises of acknowledged authority, or could be framed by adaptation in re-arrangement." Any attempt to extend a definition into an epitome of the law destroys the essential value of a dictionary by assuming the office of a digest, or a partial and incomplete encyclopædia. Mr. Black has escaped this too common error. This work is not claimed by its publishers, much less by its author, to be free from fault, but it is in our opinion one of the best dictionaries, pure and simple, accessible to the profession.

E. R. S.

THE AMERICAN DIGEST, VOL. V.—Annual for 1891. St. Paul: West Publishing Company.

A standard digest has come to be a necessity in every well-appointed law office. The time has gone by when a successful practitioner can get along without a digest. To pick out the merits that lie hidden in the shucks of thousands of cases, or to focus the rays of legal light that emanate from hundreds of judicial minds, is a task calculated to awe the most enthusiastic admirer of case-law. The American Digest is prepared and edited by the editorial staff of the National Reporter System, who have undertaken the feat of digesting these thousands of cases annually within the covers of a single volume, and considering the enormity of the undertaking, has attained a remarkable degree of accuracy. The Annual for 1891, is volume five of what is known as the third series of the United States Digest, and is also known as the "Complete Digest." It contains a digest of all the decisions of the United States Supreme Court, the United States Circuit and District Courts, the courts of last resort in all the States and Territories, and the intermediate courts of many of the States, for the year ending August 13, 1891. Many improvements on its predecessors have been introduced. It is a very substantially bound volume, handsomely printed, on good paper, and contains 2552 large pages, replete with classification headings, black letter catch lines, topical annotations, and cross-references, and is supplied with the Denison Index; all of which makes it as convenient as possible for practical work. A complete table of cases digested is given, and to this is added a table of cases over-ruled, criticised or affirmed during the year. References are usually to the Reporter Systems, but where the case has been officially reported the citation in the official report is also added. The value of previous volumes of the series is greatly increased by reference, in this volume under proper headings, to cases in the official State Reports which were cited from the reporters in the preceding volume. No pains have evidently been spared to make it a complete and authentic digest, and its value to the profession cannot be overestimated. It is to the law office what a standard dictionary is to the library.

H. D. J.

DIRECTORY OF SOCIETIES AND CLUB COURTS.

WEBSTER SOCIETY.

Wednesday evening at 7:30 in the Webster Hall.
 President, S. T. Nears,
 Vice-President, A. I. Loeb,
 Secretary, U. F. Bickley,
 Treasurer, W. A. Turner,
 Marshal, J. H. Adams.

JEFFERSON SOCIETY.

Thursday evening at 7:30 in the Jeffersonian Hall.
 President, R. A. Hall.
 Vice-President, D. W. Yancey,
 Corresponding Secretary, A. J. Davis,
 Recording Secretary, Lloyd F. Harms,
 Treasurer, G. A. Jeffers,
 Marshal, A. D. McCarty,
 Critic, J. H. Whiteley.

DOUGLASS DEBATING SOCIETY.

Saturday at 4 P. M. in the Quiz Room.
 New President and Secretary elected each meeting.
 Treasurer, Wm. Davis.

COMMOPOLITAN DEBATING CLUB.

Saturday afternoon at 2 o'clock in the Quiz Room.
 Succession of officers each week.

BENTON DEBATING CLUB.

Thursday afternoon immediately after lecture, in Room 10.

President, G. Kulper,
 Vice-President, P. N. Fennelly,
 Secretary, C. T. Cook,
 Treasurer, G. H. Albers,
 Marshal, A. McIntyre.

BREWSTER DEBATING CLUB.

Each Friday, after Junior lecture, in the Quiz Room.

President, L. M. Davis,
 Vice-President, Jas. F. Burke,
 Secretary, N. U. Bond.

CLAY DEBATING CLUB.

Saturday afternoon at 4 o'clock in Prof. Griffin's Room.

President, Thos. R. Lyons,
 Vice-President, J. A. Brown,
 Secretary and Treasurer, W. H. Giltner.

ABBOTT DEBATING SOCIETY.

Saturday afternoon at 1:30 in Prof. Griffin's Room
 President, Wm. Tichnor.

KNOWLTON CLUB.

(In nature, law and social) meets at rooms of members every Friday evening.

President, F. A. Sheldon,
 Secretary and Treasury, Geo. M. Davis.

POST GRADUATE CLUB COURTS.

Tuesday evening at 7:30 in the Quiz Room.

Chief Justice, L. W. Hughes,
 Assistant Justice, W. H. Sears,
 Clerk, P. J. Cosgrave,
 Sheriff, M. Roach.

COOLY CLUB COURT.

Friday at 2 P. M. in Room 10.

Judge, A. W. Gravelle,
 Assistant Judge J. G. Erdtitz,
 Clerk, E. E. Harrioth,
 Sheriff, Jno. Knauf,
 Prosecuting Attorney, G. M. O'Connor.

GRIFFIN CLUB COURT.

Friday afternoon at 3 o'clock in Prof. Griffin's Room.

Chief Justice, F. W. Booth,
 Assistant Justice, S. O. Neibuhr,
 Clerk, Wm. T. Hollenbeck,
 Sheriff, J. E. Gauls.

INDIANA CLUB COURT.

Monday evening at 7 o'clock in Room 10.
 Supreme Judge, F. L. Welsheimer,
 Circuit Judge, D. E. Storms,
 Clerk, Thos. W. Slick,
 Sheriff, A. D. Rose,
 Prosecuting Attorney, J. E. Hall.

IOWA CLUB COURT.

Friday evening at 7:30 in Room 10.
 Chief Justice, J. M. Manly,
 Assistant Justice, O. H. Herminghausen,
 Clerk, J. E. Orr,
 Sheriff, Jas. Harrington.

KANSAS CLUB COURT.

Thursday evening at 7:30 in Room 10.
 Judge, E. P. Hotchkiss,
 Clerk, Otis E. Hungeat,
 Sheriff, J. M. Lanier.

MICHIGAN CLUB COURT.

Monday evening at 7:30 in the Quiz Room.
 Chief Justice, J. G. Erdtitz,
 Assistant Chief Justice, V. D. Sprague,
 Clerk, C. F. Rittenger,
 Sheriff, D. McDonald,
 Prosecuting Attorney, O. B. Van Horn.

MISSOURI CLUB COURT.

Monday evening at 7:30 in Prof. Griffin's Room.
 Judge, Geo. P. Whitsett,
 Clerk, John G. Park,
 Sheriff, E. J. Bean.

NEW YORK CLUB COURT.

Wednesday evening at 7:30 in Room 10.
 Chief Justice, C. L. Burnett,
 Clerk, Louis Armstrong,
 Sheriff, H. Powers,
 Crier, J. S. Phillips.

OHIO CLUB COURT.

Thursday evening at 7:30 in the Quiz Room.
 Chief Justice, W. E. Young,
 First Associate, C. K. Friedman,
 Second Associate, C. I. Stauffer,
 Clerk, B. F. Brough,
 Sheriff, G. W. Belknap,
 Deputy Sheriff, C. E. Chadmon.

PACIFIC COAST CLUB COURT.

Saturday at 10 A. M. in Room 10.
 Chief Justice, A. I. Loeb,
 Assistant Justice, D. W. Yancey,
 Clerk, P. M. Troy,
 Sheriff, C. B. Morris.

PENNSYLVANIA CLUB COURT.

Tuesday evening at 7:30 in Room 10.
 President Judge, J. W. Browning,
 Assistant Judge, W. H. Giltner,
 Clerk, J. W. Hunter,
 Prosecuting Attorney, B. F. Clough,
 Sheriff, Thos. Lawry.

SOUTHERN CLUB COURT.

Chief Justice, D. W. Yancey,
 Assistant Judge, W. A. Turner,
 Clerk, Albert Martin,
 Sheriff, H. J. Slagle.

WELLS CLUB COURT.

Friday at 4 P. M. in Prof. Griffin's Room.
 Judge, Frank Martin,
 Clerk, A. F. Wentworth.

TRANS-MISSISSIPPI CLUB COURT.

Friday night at 7:30 in the Quiz Room.
 Chief Justice, T. A. Morrin,
 Assistant Justice, Peter Sharpe,
 Clerk, J. F. Webb,
 Sheriff, C. P. Dunbaugh.

MICHIGAN LAW JOURNAL.

VOL. I.

MARCH, 1892.

No. 2.

*SENTIMENT IN OUR NATIONAL LIFE.**

HON. GROVER CLEVELAND.

Among the few holidays which the rush and hurry of American life concede to us, surely no one of a secular character is so suggestive and impressive as the day we celebrate on this occasion. We not only commemorate the birth of the greatest American who ever lived, but we recall as inseparably connected with his career, all the events and incidents which led up to the establishment of free institutions in this land of ours, and culminated in the erection of our wondrous nation.

The University of Michigan, therefore, most appropriately honors herself, and does a fitting public service, by especially providing for such an observance of the day as is calculated to turn to the contemplation of patriotic duty the thoughts of the young men whom she is soon to send out to take places in the ranks of American citizenship.

I hope it may not be out of place for me to express the gratification it affords me as a member of the legal profession, to know that the conduct of these exercises has been committed to the classes of the Law Department of the University. There seems to me to be a propriety in this, for I have always thought the influences surrounding the practice and study of the law, should especially induce a patriotic feeling. The business of the profession is related to the enforcement and operation of the laws which govern our people; and its members, more often than those engaged in other occupations, are called to a participation in making these laws. Besides, they are constantly brought to the study of the fundamental law of the land, and a familiarity with its history. Such study and familiarity should be sufficient of themselves to increase a man's love of country; and they certainly cannot fail to arouse his veneration for the men who laid the foundations of our nation sure and steadfast in a written Constitution, which has been declared by the greatest living English statesman, to be "the most wonderful work ever struck off at a given time by the brain and purpose of man."

* Address delivered before the students of the Law Department, University of Michigan, on February 22, 1892.

Washington had more to do with the forming of the Constitution than our enthusiasm for other phases of the great work he did for his country usually makes prominent. He fought the battles which cleared the way for it. He best knew the need of consolidating under one government the colonies he had made free, and he best knew that without this consolidation a wasting war, the long and severe privations and sufferings his countrymen had undergone, and his own devoted labor in the cause of freedom, were practically in vain. The beginning of anything like public sentiment looking to the formation of our nation is traceable to his efforts. The circular letter he sent to the governors of the states, as early as the close of the war of the revolution, contained the germ of the Constitution; and all this was recognized by his unanimous choice to preside over the convention that framed it. His spirit was in and through it all.

But whatever may be said of the argument presented in support of the propriety of giving the law classes the management of this celebration, it is entirely clear that the University herself furnishes to all her students a most useful lesson, when by decreeing the observance of this day, she recognizes the fact that the knowledge of books she imparts is not a complete fulfillment of her duty, and concedes that the education with which she so well equips her graduates for individual success in life and for business and professional usefulness, may profitably be supplemented by the stimulation of their patriotism, and by the direction of their thoughts to subjects relating to their country's welfare. I do not know how generally such an observance of Washington's birthday as has been here established, prevails in our other universities and colleges; but I am convinced that any institution of learning in our land which neglects to provide for the instructive and improving observance of this day within its walls, falls short of its attainable measure of usefulness and omits a just and valuable contribution to the general good. There is a great need of educated men in our public life, but it is the need of educated men with patriotism. The college graduate may be, and frequently is, more unpatriotic and less useful in public affairs than the man who with limited education, has spent the years when opinions are formed, in improving contact with the world instead of being within college walls and confined to the study of books. If it be true as is often claimed, that a scholar in politics is generally a failure, it may well be due to the fact that during his formative period, when lasting impressions are easily received, his intellect alone has been cultivated at the expense of wholesome and well regulated sentiment.

I speak to-day in advocacy of this sentiment. If it is not found in extreme and exclusive mental culture, neither is it found in the busy marts of trade, nor in the confusion of bargaining, nor in the mad rush after wealth. Its home is in the soul and memory of man. It has to do with the moral sense. It reverences traditions, it loves ideas, it cherishes the names and the deeds of heroes and it worships at the shrine of patriotism.

I plead for it because there is a sentiment which in some features is distinctively American, that we should never allow to languish.

When we are told that we are a practical and common-sense people, we are apt to receive the statement with approval and applause. We are proud of its truth and naturally proud because its truth is attributable to the hard work we have had to do ever since our birth as a nation, and because of the stern labor we will see in our way before we reach our determined destiny. There is cause to suspect, however, that another and less creditable reason for our gratification arises from a feeling that there is something heroically American in treating with indifference or derision all those things which in our view do not directly and palpably pertain to what we call, with much satisfaction, practical affairs, but which, if we were entirely frank, we should confess might be called money-getting and the betterment of individual condition. Growing out of this feeling, an increasing disposition is discernible among our people, which begrudges to sentiment any time or attention that might be given to business and which is apt to crowd out of mind any thought not directly related to selfish plans and purposes.

A little reflection ought to convince us that this may be carried much too far. It is a mistake to regard sentiment as merely something, which if indulged, has a tendency to tempt to idle and useless contemplation or retrospection, thus weakening in a people the sturdiness of necessary endeavor and diluting the capacity for national achievement.

The elements which make up the sentiment of a people should not be counted as amiable weaknesses because they are not at all times noisy and turbulent. The gentleness and loveliness of woman do not cause us to forget that she can inspire man to deeds of greatness and heroism; that as wife she often makes man's career noble and grand, and that as mother she builds and fashions in her sons the strong pillars of a state. So the sentiment of a people which in peace and contentment decks with flowers the temple of their rule may, in rage and fury, thunder at its foundations. Sentiment is the cement which keeps in place the granite blocks of governmental power, or the destructive agency whose explosion heaps in ruins their scattered fragments. The monarch who cares only for his sovereignty and safety, leads his subjects to forgetfulness of oppression by a pretense of love for their traditions; and the ruler who plans encroachments upon the liberties of his people, shrewdly proceeds under the apparent sanction of the sentiment. Appeals to sentiment have led nations to bloody wars which have destroyed dynasties and changed the lines of imperial territory. Such an appeal summoned our fathers to the battle-fields where American independence was won, and such an appeal has scattered soldiers' graves all over our land, which mutely give evidence of the power of our government and the perpetuity of our free institutions.

I have thus far spoken of a people's sentiment as something which may exist and be effective, under any form of government, and in

any national condition. But the thought naturally follows, that if this sentiment may be so potent in countries ruled by a power originating outside of popular will, how vital must its existence and regulation be among our countrymen, who rule themselves and make and administer their own laws. In lands less free than ours the control of the governed may be more easily maintained if those who are set over them see fit to make concession to their sentiment; yet, with or without such concession, the strong hand of force may still support the power to govern. But sentiment is the life-blood of our nation. Our government was conceived amid the thunders that echoed "All men are created equal," and it was brought forth while free men shouted "We, the people of the United States." The sentiment of our Fathers, made up of their patriotic intentions, their sincere beliefs, their homely impulses and their noble aspirations, entered into the government they established; and unless it is constantly supported and guarded by a sentiment as pure as theirs, our scheme of popular rule will fail. Another and a different plan may take its place; but this which we hold in sacred trust, as it originated in patriotism, is only fitted for patriotic and honest uses and purposes, and can only be administered in its integrity and intended beneficence, by honest and patriotic men. It can no more be saved nor faithfully conducted by a selfish, dishonest and corrupt people, than a stream can rise above its source or be better and purer than its fountain head.

None of us can be ignorant of the ideas which constitute the sentiment underlying our national structure. We know they are a reverent belief in God, a sincere recognition of the value and power of moral principle and those qualities of heart which make a noble manhood, devotion to unreserved patriotism, love for man's equality, unquestioning trust in popular rule, the exaction of civic virtue and honesty, faith in the saving quality of universal education, protection of a free and unperverted expression of the popular will, and an insistence upon a strict accountability of public officers as servants of the people.

These are the elements of American sentiment; and all these should be found deeply imbedded in the minds and hearts of our countrymen. When any one of them is displaced, the time has come when a danger signal should be raised. Their absence among the people of other nations—however great and powerful they may be—can afford us no comfort or reassurance. We must work out our destiny unaided and alone in full view of the truth, that nowhere so directly and surely as here, does the destruction or degeneracy of the people's sentiment undermine the foundations of governmental rule.

Let us not for a moment suppose that we can outgrow our dependence upon this sentiment, nor that in any stage of national advance and development, it will be less important. As the love of family and kindred remains to bless and strengthen a man in all the vicissitudes of his mature and busy life, so must our American sentiment remain with us as a people—a sure hope and reliance in every phase of our country's growth.

Nor will it suffice that the factors which compose this sentiment have a sluggish existence in our minds, as articles of an idle faith which we are willing perfunctorily to profess. They must be cultivated as motive principles, stimulating us to effort in the cause of good government and constantly warning us against the danger and dishonor of faithlessness to the sacred cause we have in charge and heedlessness of the blessings vouchsafed to us and future generations, under our free institutions.

These considerations emphasize the value which should be placed upon every opportunity afforded us for the contemplation of the pure lives and patriotic services of those who have been connected with the controlling incidents of our country's history. Such contemplation cannot fail to reinforce and revive the sentiment absolutely essential to useful American citizenship, nor fail to arouse within us a determination that during our stewardship, no harm shall come to the political gifts we hold in trust from the Fathers of the Republic.

It is because George Washington completely represented all the elements of American sentiment, that every incident of his life, from his childhood to his death, is worth recalling—whether it impresses the young with the beauty and value of moral traits, or whether it exhibits to the wisest and oldest an example of sublime accomplishment and the highest possible public service. Even the anecdotes of his boyhood have their value. I have no sympathy with those who in these latter days attempt to shake our faith in the authenticity of these stories, because they are not satisfied with the evidence in their support, or because they do not seem to accord with the conduct of boys in this generation. It may well be, that the stories should stand and the boys of the present day be pitied. At any rate these anecdotes have answered an important purpose; and in the present state of the proofs, they should, in my opinion, be believed. The cherry tree and hatchet incident and its companion declaration that the Father of his Country never told a lie have indelibly fixed upon the mind of many a boy the importance of truthfulness. Of all the legends containing words of advice and encouragement which hung upon the wall of the little district schoolhouse where a large share of my education was gained, I remember but one, which was in these words: "George Washington had only a common-school education."

I will not plead guilty to the charge of dwelling upon the little features of a great subject. I hope the day will never come when American boys cannot know of some trait or some condition in which they may feel that they ought to be, or are, like Washington. I am not afraid to assert that a multitude of men can be found in every part of our land, respected for their probity and worth, and most useful to the country and to their fellow men, who will confess their indebtedness to the story of Washington and his hatchet; and many a man has won his way to honor and fame notwithstanding limited school advantages, because he found hope and incentive in the high mission Washington accomplished with only a common-school education. These are not little and trivial things.

They guide and influence the forces which make the character and sentiment of a great people.

I should be ashamed of my country, if in further speaking of what Washington has done for the sentiment of his countrymen, it was necessary to make an excuse for a reference to his constant love and fond reverence, as a boy and man, for his mother. This filial love is an attribute of American manhood, a badge which invites our trust and confidence and an indispensable element of American greatness. A man may compass important enterprises, he may become famous, he may win the applause of his fellows, he may even do public service and deserve a measure of popular approval, but he is not right at heart and can never be truly great if he forgets his mother.

In the latest biography of Washington we find the following statement concerning his mother: "That she was affectionate and loving cannot be doubted, for she retained to the last a profound hold upon the reverential devotion of her son; and yet as he rose steadily to the pinnacle of human greatness, she could only say that 'George had been a good boy and she was sure he would do his duty.'"

I cannot believe that the American people will consider themselves called upon to share the deprecatory feeling of the biographer, when he writes that the mother of Washington could "*only*" say of her son, that she believed he would be faithful to the highest earthly trusts, because he had been good; nor that they will regard her words merely as an amiably tolerated expression of a fond mother. If they are true to American sentiment, they will recognize in this language the announcement of the important truth, that under our institutions and scheme of government, goodness such as Washington's, is the best guaranty for the faithful discharge of public duty. They will certainly do well for the country and for themselves, if they adopt the standard the intuition of this noble woman suggests, as the measure of their trust and confidence. It means the exaction of moral principle and personal honor and honesty and goodness as indispensable credentials to political preferment.

I have referred only incidentally to the immense influence and service of Washington in forming our Constitution. I shall not dwell upon his lofty patriotism, his skill and fortitude as the military commander who gained our independence, his inspired wisdom, patriotism and statesmanship as first president of the republic, his constant love for his countrymen and his solicitude for their welfare at all times. The story has been often told and is familiar to all. If I should repeat it, I should only seek to present further and probably unnecessary proof of the fact, that Washington embodied in his character and exemplified in his career that American sentiment in which our government had its origin and which I believe to be a condition necessary to our healthful national life.

I have not assumed to instruct you. I have merely yielded to the influence of the occasion and attempted to impress upon you the importance of cultivating and maintaining true American sentiment, suggesting

that as it has been planted and rooted in the moral faculties of our countrymen, it can only flourish in their love of truth and honesty and virtue and goodness. I believe that God has so ordained it for the people he has selected for his special favor; and I know that the decrees of God are never obsolete.

I beg you therefore to take with you when you go forth to assume the obligations of American citizenship, as one of the best gifts of your *Alma Mater*, a strong and abiding faith in the value and potency of a good conscience and a pure heart. Never yield one iota to those who teach that these are weak and childish things, not needed in the struggle of manhood with the stern realities of life. Interest yourselves in public affairs as a duty of citizenship; but do not surrender your faith to those who discredit and debase politics by scoffing at sentiment and principle, and whose political activity consists in attempts to gain popular support by cunning devices and shrewd manipulation. You will find plenty of these who will smile at your profession of faith and tell you that truth and virtue and honesty and goodness were well enough in the old days when Washington lived, but are not suited to the present size and development of our country and the progress we have made in the art of political management. Be steadfast. The strong and sturdy oak still needs the support of its native earth, and as it grows in size and spreading branches, its roots must strike deeper in the soil which warmed and fed its first tender sprout. You will be told that the people have no longer any desire for the things you profess. Be not deceived. The people are not dead but sleeping. They will awaken in good time, and scourge the money changers from their sacred temple.

You may be chosen to public office. Do not shrink from it, for holding office is also a duty of citizenship. But do not leave your faith behind you. Every public office, small or great, is held in trust for your fellow-citizens. They differ in importance, in responsibility and in the labor they impose; but the duties of none of them can be well performed if the mentorship of a good conscience and pure heart be discarded. Of course other equipment is necessary, but without this mentorship all else is insufficient. In times of gravest responsibility it will solve your difficulties; in the most trying hour it will lead you out of perplexities, and it will at all times deliver you from temptation.

In conclusion, let me remind you that we may all properly learn the lesson appropriate to Washington's birthday, if we will; and that we shall fortify ourselves against the danger of falling short in the discharge of any duty pertaining to citizenship, if being thoroughly imbued with true American sentiment and the moral ideas which support it, we are honestly true to ourselves.

"To thine own self be true,
And it must follow as the night the day,
Thou canst not then be false to any man."

HOW MAY PRESIDENTIAL ELECTORS BE APPOINTED?

PROF. B. M. THOMPSON.

For more than half a century presidential electors have been chosen upon a general ticket in all the states. This was not the uniform practice at first. Judge Cooley in the last number of the JOURNAL makes it clear that at least four different methods were at first adopted, one of them, the "district system," being that selected by the last legislature of Michigan. Following Judge Cooley's article is one by Gen. B. M. Cutcheon attacking this system on two grounds: *First*, that it is in conflict with the Constitution of the United States; and, *secondly*, that it is mischievous in its effects.

Gen. Cutcheon assumes as the basis of his argument that the power to appoint electors is a delegated power. He says: "The power of a state to appoint presidential electors is a delegated power, and delegated only. It is not among the natural or inherent rights of states. It is delegated by the people of the United States through the Constitution, and cannot be re-delegated to districts or minor municipalities." This proposition has the merit of perspicuity. The people of a state have no natural or inherent right to have a voice in the selection of their chief magistrate. The state is a mere tool, doing this work, not for itself, but for another, an agent with special and limited powers, whose acts, to be valid, must be within the power conferred, and when valid are the acts of the principal and not of the agent. Gen. Cutcheon has not deemed it necessary to support by any argument his assertion that the power to appoint electors is a delegated power, and consequently we are not informed by what process of reasoning he comes to the conclusion that the Constitution in this instance must be regarded as a sort of governmental filter into which the people have poured a solution of crude powers, that percolating through have descended upon the state in the form of a gentle and fructifying constitutional dew.

This assumption finds no support in the letter of the Constitution. Article 10 of the amendments, provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people." There is no intimation here that there is an important class of powers, wholly outside of the reserved powers, which belong to the people of the states not as "natural or inherent rights" but delegated by the people to the people, "through the Constitution." Without the Constitution as a medium of transmission it would have been impossible for the people themselves to

have delegated these powers to themselves, and they would not then be delegated powers, but would have remained natural and inherent.

It is only upon the assumption that the power to appoint electors is a delegated power that Gen. Cutcheon's argument has any force. If, on the other hand, it is a power incident to the right of self-government, belonging to the state or the people of a state as a political unit, then the Constitution is to be construed, not as delegating to the states the power to appoint electors, but as limiting and regulating the exercise of a power reserved by the states. This distinction is an important one. If this is a power delegated by the Constitution it must be exercised by the person to whom it is delegated and in the manner prescribed. If, on the other hand, the Constitution merely limits and regulates a general power reserved by the people of a state, it may be exercised in any manner not in conflict with the terms of such limitation and regulation.

Let us examine Gen. Cutcheon's argument, assuming for the purpose, that the power to appoint electors is a power delegated to the state. As he points out, there are several definitions of a state, one of them being "all the people of one state." This power, therefore, which is delegated to the state is delegated to the people of the state, and they may consequently exercise the power. The electors, as Gen. Cutcheon says, may be appointed "by the people of the state at large by general ticket." "But," he continues "the legislature cannot delegate or remit the power or jurisdiction of appointing to certain congressional districts and vulgar fractions of a state, as has been attempted in Michigan. The state shall appoint the electors. It must appoint them all, and the act of a district is not the act of a state." If the power to elect the president, the executive branch of the general government, is delegated by the people "through the Constitution," it follows that the power to elect the members of the house of representatives, a part of the legislative branch of the government, is, in like manner, delegated. The Constitution provides, "delegates." Article 1, Section 2: "The house of representatives shall be composed of members chosen every second year *by the people of the several states.*" Here we have a power to choose members of the house of representatives delegated to the people of each state, or, since "all the people of one state" are the state, to the state. It follows, if Gen. Cutcheon's position is correct, since the power to choose representatives is delegated to the people, that "the people cannot delegate or remit the power or jurisdiction of choosing to certain congressional districts and vulgar fractions of a state," or, of the people. For more than half a century, however, members of the house of representatives have been chosen by these "vulgar fractions" in all of the states. And many of those states have not "held to the constitutionality of nullification and secession" and in that manner obscured this constitutional question.

Since the state as a body corporate may act through the people at large, the people of a state may act through the state in its corporate capacity. It is immaterial, therefore, whether a power is delegated to the

state or to the people of the state. The "delegated" power to appoint electors has been exercised by the state through the legislature, by the people at large and by the people in the several congressional districts, and the "delegated" power to choose members of the house of representatives has been exercised in the same manner, by the legislature, by the people at large and by districts. By no process of reasoning can it be shown that a given method of electing members of the house of representatives is constitutional and that a like method of appointing electors is unconstitutional.

Gen. Cutocheon recalls the fact that in 1800, while John Jay was governor of New York, the then Democratic party of that state attempted to introduce the district system, and that the Federalists declared it would be unconstitutional. He infers that John Jay, being a Federalist, must have so held. Had he read the paragraph immediately following his quotation from Pellew's Life of Jay, he would have saved himself this inference. Mr. Pellew goes on to say that the elections of that year, having gone against the Federalists, Alex. Hamilton, Philip Schuyler and others wrote to Mr. Jay urging him to call an extra session of the legislature for the purpose of adopting the district system, and that Jay refused. The letter from Hamilton to Jay referred to by Mr. Pellew is found in the sixth volume of Hamilton's works, page 438, and contains a very significant sentence. He is endeavoring to persuade Jay that he ought not to hesitate to call the legislature together on account of any personal scruples as to the propriety of the act, and says: "They ought not to hinder the taking of a *legal and constitutional* step to prevent an atheist in religion, and a fanatic in politics, from getting possession of the helm of state." The italics are Hamilton's. He evidently took it for granted that Jay believed the proposed act was constitutional, and Hamilton and Jay were close personal and political friends. The endorsement of Jay upon this letter assumes as much: "Proposing a measure for party purposes which I think it would not become me to adopt."

Gen. Cutocheon claims to find support for his view in facts *aliunde*. He says:

"1.—In the constitutional convention it was moved by Wilson, of Pennsylvania, that electors be appointed by the people, by districts, but the motion was rejected, eight States to two.

"2.—In case no candidate for President receives a majority of all the votes in the electoral college, the election goes to the House of Representatives, and there the election is not by districts but by States, each State having one vote.

"3.—The uniform and unbroken practice of all the States for sixty years shows the consensus of opinion of States and statesmen as to the proper and constitutional method of appointing electors, and appreciation of the evils arising from a departure from it."

The proposed amendment of Mr. Wilson was to limit the appointment to one particular method. That was rejected, and no limit was

imposed. It does not follow that the method rejected as a sole method is thus prohibited altogether. If that was the effect, it is fortunate that every conceivable system of appointing electors was not presented as a sole method and rejected, for in that event the appointment of electors would have been made impossible.

We do not see what bearing the second proposition has upon the *appointment* of electors. It is true that in the house of representatives each state has one vote. In the electoral college each state casts as many votes as it has electors and these votes may be thrown for as many different candidates. Does it follow therefore, that the electors cannot be chosen by districts? Or again, are we to infer, since in the house of representatives the vote of the state is cast by her representatives, who are elected by districts, and in the electoral college the vote of the state is given by her electors, therefore the electors may not be appointed by districts?

Why, in making an appeal to historical precedent, does Gen. Cutcheon summon the last sixty years and challenge the first forty of our constitutional history? Why ignore the plain language and the plain and significant practice of the framers of the Constitution? Upon this phase of the question we can add nothing to the luminous statement of Judge Cooley.

The state may have the power to appoint presidential electors by the action of the congressional districts and still its exercise may be unwise and inexpedient. This is purely a political question and one which the limits of this article do not permit us to discuss at length. Undoubtedly objections to the district system exist. Like any and all systems and devices of government, it may be abused. That, however, is not necessarily an argument against the system. Danger of abuse is incident to all independent governmental power in every form of government and especially in a republican government. To one who does not believe that the people are capable of self-government it is a very serious, if not an unanswerable objection. Gen. Cutcheon does not belong to that class of political thinkers or to any offshoot of that class. He claims, however, that the district system is fraught with serious evils both to the state and to the nation, as compared with the present system. He says that, "it introduces confusion and uncertainty; it fritters away and destroys the power and dignity of the states which adopt it." The "confusion and uncertainty" which he has in mind is that confusion and uncertainty, now attendant upon every congressional election. The framers of the Constitution intended to create a greater confusion and uncertainty. They did not anticipate that the appointment of electors would unerringly indicate the subsequent election of a particular person. They made deliberate choice of this greater uncertainty and confusion. To them the appointment of electors upon the ticket at large or by separate districts was a matter of no concern. They anticipated that all the confusion and uncertainty would be due to the subsequent untrammelled and independent action of the elec-

tors. They did not foresee that by the action of conventions, bodies of men unknown to the Constitution, the work of the electors would be purely perfunctory, legalizing the void action of party conventions. It is true that now all the confusion and uncertainty of a presidential election centers on the general result in a few doubtful states, some half a dozen, more or less, and that under the district system the general result in those doubtful states would lose its importance and the result would depend upon the result of the district elections considered as a unit. Would this be a deplorable evil? It must be conceded that the district system would destroy "the power and dignity" of the states, as states, in the electoral college. It would substitute instead thereof, however, the power and dignity of the people. To a person whose views of state rights lead him to regard the power and dignity of the state as of paramount importance, this objection is certainly serious, but we are surprised that it should be urged with such prayerful consideration by Gen. Cutcheon.

The principal objection against the district system is that it promotes "gerrymandering." This is the objection urged by the president in his recent message to Congress and is the one strongly dwelt upon by Gen. Cutcheon.

A "gerrymander" cannot be defended. Its sole purpose and object is to give one class, or, division of voters an unfair advantage over another class or division. It may be made in the interest of the majority of the people or of a minority. It is always in favor of the class of voters having control for the time being of the legislature and consequently, is usually in the interest of the political majority and to the injury of the minority, who are thus deprived wholly, or partially, of their just representation. Its success measures the objection to any particular "gerrymander," that one being the most objectionable which is most successful. Now the system of appointing electors upon a general ticket is a "gerrymander" perfected and glorified. It deprives the minority in a state of all representation whatever in the electoral college. This is the very object and purpose of the system. It is favored in every state by the majority and has therefore been adopted by the majority in every state as the most perfect "gerrymander" that could be devised. Take for instance the state of Michigan, and, at the coming election for the first time since her admission into the Union, will the minority of her voters be represented in the electoral college. It will be the fourteenth time she has voted for president, and on three-fourths of those occasions the minority have known before the election was held, that casting their votes would be a mere matter of form; that the only right they had in that presidential election was the right to stand up and be counted—out. There may be objections to the district as compared to the present system of appointing presidential electors, but that it promotes "gerrymandering" is, assuredly, not one of them.

HOW PRESIDENTIAL ELECTORS MAY NOT BE APPOINTED.

HON. MOSES TAGGART.

The unconstitutionality of the method of appointment of presidential electors, by congressional districts, and two districts created by an arbitrary division line from north to south, cannot well be claimed free from doubt, so long as lawyers of such national repute as Ex-Senator Edmunds and E. J. Phelps hold diametrically opposing views. This new method has attracted much attention in the country at large, because of its possible bearing on the next presidential election, and has aroused much feeling among all fair-minded men in Michigan, irrespective of party, because of the unparalleled outrage of the last legislature, making it possible to adopt such measure.

Aside from the question of its adoption, by the vote of Senator Friedlander, of uncertain title, and its conflict in certain particulars, with the laws of the United States, the act depends upon the construction placed upon Article II of the Federal Constitution. The meaning of such constitutional provision, both from its terms and practical construction placed thereon, is claimed to show the so-called Miner law both void and valid, according to the standpoint and legal vision of the respective parties discussing it. The question has been discussed from an historical point of view, more than by the application of well-known rules of construction, applicable alike to constitutions and statutes.

Professor Thompson, in his discussion of the law, takes General Cutcheon to task for speaking of the action of the State in appointing these electors, as the exercise of a delegated power, and not of an inherent right. The Federal Constitution is a compact between the States originally adopting it, and with those thereafter applying for admission and received within the Union. This did not constitute a delegation of powers, but in so far as it extended, a limitation of the power of the States, a rule by which they were to be governed in matters pertaining to the general government.

The right to appoint presidential electors, while in the technical sense not delegated, is derived from and dependent upon the Constitution, as but for it, and its adoption by a State, such municipality would not be a part of the United States, nor, to use the language of the professor, subject to its "fructifying constitutional dew."

If such authority is not delegated, but a mandatory provision of the Constitution, it is none the less binding.

Professor Thompson concedes much force to General Outcheon's argument, if the power is a delegated one, but insists, if it is a power incident to self-government belonging to the State or the people of a State as a political unit, then it must be construed as simply limiting and regulating the exercise of the power reserved by the states. How can that be an "incident of self-government" of a State which is directly connected with national government and the securing of a chief magistrate for the United States? It is generally supposed the selection of President, the election of Senators and Representatives, for all of which the Federal Constitution provides, are incidents, not of the "self-government" of a State, but of the nation. The framers of the Constitution appear to have had that understanding in fixing the qualification of such electors, the method of their voting, of counting their votes, the eligibility of President and Vice-President, and reserving to Congress the right to fix the time of choosing electors, and the day that they should give their votes. The election of governor, ordinary state officials, state legislators, the enactment of state laws, are all connected with and incidents of state self-government, and any suggestion in the convention framing the Constitution that such action be controlled, or in any manner interfered with by Congress, would for such reason have been instantly rejected.

It is conceded, if the power is delegated by the Constitution, it must be exercised by the person to whom it is delegated, in the manner prescribed, but argued, that if only a regulation of a general power reserved by the State, it may be exercised in any manner not in conflict with the limitation. This simply brings us back to the constitutional provision, a part of the original compact between State and Nation. It either does or does not fix a limitation. If the language used, in terms or by necessary implication, limits, it is binding, whether a delegation of power or otherwise. The "State shall appoint," not may appoint these electors. The word "State" is not of doubtful meaning, either in common parlance or in the score or more times where used in other provisions of the Constitution, it invariably and unquestionably as so used denoting the whole of the body corporate so termed.

The checks and safeguards of one body upon another in the election of officers of the Union and in controlling its affairs intended by the giant intellects framing the fundamental law of this country, are nowhere more compactly and tersely stated than by Senator Edmunds, who says: "They prescribed the method of creation, and action of each of its parts; for one part, the people acting in their primary capacity, for another part, the legislative representation of the people acting as a legislative body, and for another part the State acting as a State with a voice single for the object named. Both the logic of the situation at the framing of the Constitution, and the equilibrate harmony of the Constitution, absolutely demanded the single action and the single voice by each state in the constitution of the presidential electoral body." [February Forum.]

If it is the State as a whole that is to appoint, then the exercise of this prerogative by the whole State cannot be curtailed by the legislature limited in its action to directing the "manner" in which the State, as a whole, as a unit, shall appoint or elect presidential electors. Any attempted transfer of this power to a portion of the State, even as to the election or appointment of one elector, is a violation of the Constitution, the withdrawal from the entire State of authority, not only directly conferred by the Constitution but expressly required to be exercised by positive language. Chief Justice Marshall says: "The enlightened patriots who framed our Constitution and the people who accepted it must be understood to have employed words in their natural sense, and to have intended what they have said." [Gibbons vs. Ogden, 9 Wheat., 1.] Judge Cooley lays down the rule that where "fundamental rights are declared by the Constitution," it is not necessary to prohibit the legislature from taking them away. [Const. Lim., p. 210.] Other language used by this eminent jurist and law writer with reference to State constitutions, but equally applicable to the principle involved, I venture to quote. "Where the sovereign power of a State has located the authority, there it must remain," and "by the constitutional agency alone the laws must be made until the Constitution itself is changed." "The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." [Ib., 117.]

If the construction of this noted clause is not to be determined from the ordinary meaning of the language, and the legislative discretion to direct the "manner" in which presidential electors may be appointed is held to authorize it to direct an appointment of any of those electors to which a State may be entitled by less than the entire State, then it would follow it may go still further and direct that all of the same should be appointed by some particular portion of the State. Under such view, the last legislature of the State could have directed that its fourteen electors should be elected from fourteen counties of right political complexion, or by what might have been considered "getting still nearer the people" by the county of Wayne, which was known to be "all right."

In principle, if the right of an elector or of a portion of a State can be deprived of the privilege of aiding in the appointment of eleven presidential electors, the same rule carried out would deprive him or it from any part in the selection of the twelfth.

The legislature cannot divest itself or the State of a power given it by the state constitution, or delegate the exercise of the same to a municipal body. [People vs. Riordan, 75 Mich.]

No more can it curtail or limit the power vested in the State by the Federal Constitution. If this discretion of the legislature to determine the "manner" of appointment is unlimited, as argued by the supporters

of the new method, then the right to act might be conferred upon the citizens of any township, or a single individual, as long as they or he constituted a part of the "State," the "People." If the constitution of the State provided that the ordinary county officers should be appointed by the board of supervisors of a county in "such manner as the legislature should direct," would Professor Thompson concede that the legislature could legally "direct" that the appointment of these officials could be parceled out, so that supervisors from certain townships should appoint one, and from certain other townships another, until the list was completed?

If the Federal Constitution provided the Supreme Court of a State should appoint the presidential electors in such manner as the legislature directed, and for certain reasons, not political of course, the legislature in its discretion directed the "manner" of the Court's action by parceling out the electors among the several judges, each to appoint a part, or perhaps one to appoint all, or all but one to be selected by his associates, would Professor Thompson hold such action an "incident of State self-government" and valid?

Possibly these illustrations may be said to be extreme or absurd. No argument in support of this law has admitted any limitation of legislative discretion.

The fact that a certain construction of an act carried out may lead to hardship or absurdity, is good evidence such was not the one intended by its framers.

Judge Christianity said, in *Woodbridge vs. City of Detroit*, 8 Mich., p. 307. "The fact that a proposed rule of construction would remove constitutional restraint, is very strong evidence that the rule must be erroneous." [*Heidenfelt vs. Daney, etc., Mining Co.*, 93 U. S., p. 634.]

Construing this language as it reads is but applying the rule laid down by the courts, and is not a restricted or narrow construction.

Chancellor Kent placed a much closer construction upon Section 3 of Article I of the Constitution, which provides that United States Senators shall be chosen by the legislatures of the states. The custom then, as now, had always been to choose the Senator by joint ballot of the two houses. After referring to this practice, the great Chancellor says: "I should think, if the question were a new one, that when the Constitution directed that the Senators should be chosen by the legislature, it meant not the members of the legislature *per capita*, but the legislature, in the true technical sense, being the two houses acting in their separate and organized capacities, with the ordinary constitutional right of negative on each others proceedings." [*Kent Com.*, I, p. 226.]

But it is urged by Professor Thompson and others, that whatever the literal meaning of words used, practical construction has fixed a legal meaning which primarily would not have been given them. The principal argument for practical construction is based upon the practical construction of Article I, Sec. 2, reading, "The House of Representatives shall be composed of members, chosen every second year by the people of the

States." It is argued as "all the people of the States" are the State, that the action of States in electing congressmen from districts composed of parts of States, the right to so select presidential electors exists, although it was only done in exceptional cases for the first forty years, and not at all for the last sixty years of the existence of the Union.

This argument and position suggests the following questions: 1st, Is the language used, such as calls for the application of the rule of practical construction? 2d. Has the construction placed upon one clause of an Article of the Constitution any force or value in construing the language of another Article? 3d. Has there in fact been any such construction of Article I, Sec. 2, and Article II, Sec. 2, as to sustain the new method?

(a) When the language of an act is so clear and explicit as not to be open to question, its construction cannot be changed by long continued practice. [U. S. vs. Graham, 110 U. S. 126]. "Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries." [Story Const., Sec. 407.] "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution." [Cooley Const. Lim., p. 71].

Judge Campbell, on the construction of statutes, says, "It would require a very clear case of practical acquiescence to authorize us to compel the head of a bureau to follow precedents which he does not himself regard as binding, unless they are so harmonious with the language of the law as to create no repugnance to it." [Employer's Assurance Co. v. Com. of Ins., 64 Mich., p. 616]. These quotations state the general rule, and while sometimes encroached upon a little by the courts, the law as stated is the accepted doctrine of the courts. Contemporary or practical construction is of great aid frequently, in getting at the true meaning of statutes and constitutions, when ambiguous, but the weight attached to it depends both upon its uniformity and how long continued.

The rejection of this particular method by the convention shows the evident intent of the framers of the Constitution as pointed out by General Cutcheon, to have States act as a unit, is of importance under rules of construction laid down by the court. There is nothing uncertain as to the meaning of the word "State" if all law writers and lexicographers are taken as authority.

(b) Conceding the word "State" means all of the people of a State, and the construction placed upon Article I, Section 1, in the election of Congressmen in districts, does it follow, that when the word "State" is used in another article of the Constitution, and another connection that it must be construed in the same manner. It is an old saying that two wrongs do not make one right, and it would seem to follow that one wrongful construction of one clause of the Constitution should not be held a conclusive precedent for the construction of another. At most, such construction could have but little weight, and when as has been pointed out, the

word "State" has been used so many times in the Constitution, and uniformly as meaning the entire body politic as a unit, and not in the sense sought to be placed upon it by the upholders of the new departure, what force the point and argument would otherwise have appears to be fully met.

(c) The validity of the new method has never been raised before any body authorized to act upon it. The force of a practical construction depends much upon whether objection to action was made, and so considered, in action had.

The selection of electors by any method or methods however varied the "manner" may be, so long as the power is exercised by the "State" as a whole or a body representing the entire State, is not a precedent to support the district theory. So in considering what practical construction applies, we must confine ourselves to the selection of electors by districts. Upwards of one hundred years have elapsed since the adoption of the Constitution, For the first forty years, in a few exceptional cases, never at any time in a majority of the States of the Union, selection of electors were made in districts. For the last sixty years the electors have been chosen in every state in the Union by the voice of its entire people, or the legislature representing the State as a unit. How can the action of a small minority of the States for the shorter period be held a conclusive practical construction as against the action and construction of all the States for the longer period?

Why should not the practical construction of the clause by the action of a great majority of the States during the shorter period, be held to settle, the construction against Professor Thompson's theory, leaving out of consideration the uniform adverse construction placed upon it for the last sixty years? The great law writers, Kent and Story, while not discussing the constitutionality of this method, the same having been abandoned in their day, refer to it with unequivocal language of condemnation and disapproval. Was it left for the inexperienced legislator of 1891 to discern the long lost treasure, and bestow the blessing of its "fructifying dew" upon the people of Michigan?

To concede, as does the learned professor, that gerrymander cannot be defended is but to concede that this new method cannot be defended, although he reaches the opposite conclusion. Does any one believe, but for the application of this practice to the gerrymandered congressional districts of the State, made by the last legislature, the act in question would have been passed?

Mr. Thompson says: "There may be objections to the district, as compared to the present system of appointing presidential electors, but that it promotes gerrymandering, is assuredly not one of them." The motive for gerrymandering in the past has been the securing of a few more members of, and at most, the control of the House. This temptation to political rascality has in the past been sufficient inducement to lead parties to its most obnoxious practice. For illustration, the State of Ohio, in its last election, which resulted in giving one party twenty thousand majority,

gave the minority party a majority in fifteen out of its twenty-one gerrymandered districts, and this, notwithstanding the fact, that the votes of the two parties are not centered at any one point in the State.

The securing of the chief magistrate, the political control of the country's affairs and offices for four years, constitutes a motive, and impelling power to corrupt practices, for selfish, unscrupulous and dishonest politicians, not to be compared with the capturing of a few members of congress. When temptation ceases to tempt, when the magnitude of plunder does not increase the probability of crime on the part of the natural felon with the opportunity open before him, then it may be argued with show of reason, that the attainment of a glittering prize of the highest office of the greatest Nation in the world, with its vast patronage and power is no temptation to the man or men, regardless of party, lacking in political honor, devoid of political or patriotic principle.

The burden of Professor Thompson's argument is not that these electors cannot be chosen at large in the State, nor that such was not the intent of the framers of the Constitution, but that there are several methods that can legally be resorted to, and among them the district system. He charges, however, that the "system of appointing electors upon a general ticket is a gerrymander perfected and glorified."

A gerrymander is an unfair, dishonest political practice, and to charge upon the noble, unselfish patriots who framed this wonderful document, the admiration of which is only equalled by the admiration for its authors throughout the whole world, that they intentionally "perfected and glorified" a wrong, is altogether too severe an arraignment, and one which their posterity may well feel called upon to resent. Webster's definition of this noted word is "to divide a State into local districts, for the choice of representatives in a way which is *unnatural and unfair* with a view to give a political party advantage over its opponent."

The application of such a charge to the work of the founders of this Nation was merely a slip of the pen, not intended to question the motives of the men seeking to form a republic, worthy of its greatest patriot, Washington, that would stand the test of time, both as against the assault and dishonesty of internal enemies, and the attacks of foreign foes.

To quarrel with the right of the majority of a State to control the minority is to question the wisdom of the Constitution, a direct attack upon the necessary institutions of a republican form of government, as its existence is dependent upon majority rule under constitutional limitations. Mr. Thompson, in illustration, takes Michigan and says: "It will be the fourteenth time she has voted for president, and on three-fourths of those occasions the minority have known before the election was held that casting their votes would be a mere matter of form; that the only right they had in that presidential election was the right to stand up and be counted—out."

Is this intended as an argument in support of the unscrupulous action in some respects criminal, of that minority, the last legislature, when it got

into power? Such language, coming from a learned professor of the great University is liable to a construction hurtful in the extreme. Suppose the minority have failed to control the majority. Such necessarily is the result in all bodies controlled by the votes of their members. The voters constituting the minority have been permitted to cast their ballots, to have their votes counted.

So far as the question discussed is concerned, it can only be settled by the courts, the final arbiter, and with its decision all must abide, even though not content.

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE, Editor and Business Manager.

H. D. JEWELL,

Managing Editors.

ELI R. SUTTON.

ASSISTANT EDITORS.

**J. E. ROBERTS,
ARTHUR WEBSTER,**

**W. M. HARVEY,
O. B. VANHORN.**

Published monthly, during the college year, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

THE students of the law department have just cause to feel elated over their Washington's Birthday celebration. That one who has held the highest position of trust at the disposal of the American people, should consent to deliver an address under their auspices, is no small honor. The presence of many other distinguished guests was also a mark of distinction, and it is a source of much gratification to recognize the high esteem in which our University is held.

ONE of the things which would undoubtedly be instrumental in raising the standard of the legal profession is the organization of local bar associations. In a few cities and counties of the state such organizations have already been perfected with most satisfactory results. The latest organization of the kind is the Saginaw County Bar Association formed last month. One of the events long to be cherished, in the memory of the bar of that county was their first annual banquet, held in Saginaw on the evening of February 12, at which the JOURNAL had the pleasure of being represented. Nearly one hundred members of the association and several invited guests participated in the occasion. Hon. W. L. Webber, president of the association, delivered an address of welcome, and toasts were responded to by Chief Justice Allan B. Morse, Associate Justice C. B. Grant; Hon. J. W. Champlin, of Grand Rapids; Hon. Edward Cahill, of Lansing; Hon. H. H. Hatch, of Bay City; and Hon. John Moore and Hon. J. A. Edget, of Saginaw.

The mutual benefits to be derived from occasions of this kind cannot be over-estimated. The busiest lawyer may well afford to set aside a few hours annually to spend in social intercourse with his fellow practitioners. Nothing can be more appropriate than that strained relations be thrown aside for a time and that chief justice, judge and lawyer may mingle together as man and man. The example should be followed by the bar throughout the state.

WE are very much encouraged by the favor with which the MICHIGAN LAW JOURNAL has been received. Its success has far exceeded our expectations. An extra number of copies was printed, so that the JOURNAL might be introduced to the lawyers of the state and the alumni of the law school, by means of sample copies. But the edition was exhausted within a week of its issue by the demand for it in the shape of subscriptions and the sale of single copies. It was found necessary to publish a second edition nearly as large as the first, and this edition is going so rapidly that we have been forced to lay aside a sufficient number to meet the demand for back numbers in the future. The students of the law school have not subscribed in as large numbers as we anticipated. We cannot conceive the reason for this. It cannot be the price, for it is placed within the reach of every student in the school. The price could not be made less without absolute loss to the JOURNAL. Because of the technical character of the publication, we must look for support, as far as the University is concerned, almost entirely to the students in the law department. They should take sufficient interest, if not pride, in their department publication to ensure its financial success. We urge the members of the senior class particularly, who have not subscribed already, to do so now for a whole year, that is until February, 1893. We cannot complain of the support that has been received from the lawyers of the state and the alumni generally. As some of them have said to us, they take the opportunity of subscribing to the JOURNAL not only because it will be of practical value to them, but because they take pride in the publication and believe that it should be enabled to stand favorable comparison with any law journal in the country.

AN interesting controversy is in progress in New York City between the Metropolitan Telephone and Telegraph Company and those who rent their telephones. The latter have organized into a Telephone Subscribers' Association, and will apply to the state legislature to compel the company to reduce their charges, the company having recently very largely increased their annual rent. The subscribers claim that by purchase and manipulation, and by all the sinister devices known to lawyers, the owners of the telephone have persistently fought against its development, believing that their private advantage lay in stunting its growth and retaining as many of its original imperfections as possible. The subscribers complain that the telephone service, instead of being easy, prompt, rapid, accurate, and popular, is laborious, tedious, slow, slovenly and detested, and that to these deficiencies is added the rank offence of a great increase in the charge for service.

The officers of the telephone company question the right of the public, through the legislature, to regulate telephone charges. The subscribers answer that the right of the state to regulate is recognized in all cases where the service operates as a monopoly; where public streets and public highways are used; and where the service is of such a character that its use has become a matter of necessity on the part of the community. Then, the plant or property is affected by a public use, and the public is ipso facto taken into copartnership. In either of such cases the public right to regulate charges is as clear as though the owners of the plant were exercising the right of eminent domain. Such is the principle decided by the Supreme Court of the United States in *Munn vs. State of Illinois* (94 U. S., 113), which is the leading case, and which has been steadily followed not only by the Supreme Court of the United States since, but also by the courts in New York and every other state in the Union. In that case the

question was whether the state of Illinois had the right to regulate in the city of Chicago the charges of an elevator in the hands of private persons (not a corporation), and built upon property purchased by the proprietors, and not acquired by the exercise of the right of eminent domain; and the right to regulate, as determined affirmatively to exist in that case, was based on the grounds of the exigencies of commerce and of the power of the legislature to protect the community from the exactions of monopolies, and also on the ground that whenever the service is of such a nature as to be a public necessity the right to regulate flows therefrom. The telephone companies use the public highways, and if the state has the right to regulate the tariff of a cab that plies for hire on a public street, or of any other instrumentality for the transportation of individuals along and through the public highways, they have precisely for the same reason the right to regulate the transportation of intelligence.

ELECTRIC RAILWAY LITIGATION.—In an address delivered at the fourteenth annual meeting of the New York State Bar Association, Hon. John S. Wise said, "One of the most marked changes which has taken place in our profession of late years is the rapid crystallization of our employments into specialties. . . . Within the last twenty-five years vast changes have taken place in almost every department of law. . . . Methods of business have changed more in thirty years than they did in two centuries preceding. Branches of industry discovered but yesterday have sprung up and grown with the rapidity of Jonah's gourd, until the capital employed in them mounts up to hundreds of millions. . . . Following in the train of all these new branches of business has come their aftermath of law, filled with questions of novelty and difficulty."

One of the most surprising and remarkable of these growths, to which Mr. Wise alludes, is that which has followed the introduction of electricity into the business and commerce of the world, and the multitude of ingenious and practical purposes to which this wonderful form of energy is put. Besides the telegraph, the law concerning which is quite firmly established, electricity plays the principal part in the construction and operation of the telephone, electric light, and electric railway. It would be impracticable to enumerate here, at length, the manifold uses to which electricity is put, but it is interesting to note, as illustrative of the important part it is to play in the business of the world, and therefore in the law, a few of the wonderful devices which electricians have invented and introduced into common use. Electricity is very extensively used as a motive power, running machinery of every description. It is employed in electro-plating, smelting, welding, and heating. It is an important, useful, and powerful agent in time of war, being used in the operation of torpedoes, range-finders, and search lights. Electricity is used in hotels and residences in conjunction with a number of appliances of convenience. The largest mines of the country are now worked by electrical mining machinery. Criminals, condemned to capital punishment, are ushered into eternity by electrocution. Telegrams are sent from moving trains, and block and road-crossing signals and train-brakes are operated by electricity. The work of compiling the last census was materially lessened by the use of electrical tabulating machines. As illustrating the strange uses to which electricity is put, mention might be made of the electrical plow, and self-winding clock. In Sweden it is used to hasten the growth of plants by spreading an artificial warmth throughout the surface of the soil. By an ingenious manipulation of electrical devices music can be transmitted from concert halls to private dwellings.

The possibilities for the adaptation of electrical energy seem unlimited. It has a vast field in which to work, and it is not improbable that instruction in the elements of electrical science will, of necessity, form part of the education of the intelligent lawyer of the future. The law of electricity is already becoming a special branch of the law, and the decisions of the courts upon questions involving the telegraph, telephone; electric light, electric railway, and other electrical appliances, are multiplying with great rapidity.

The most recent development in the law of electricity is the litigation that has arisen over the rights and liabilities of electric street railways. Four years ago there were only thirteen electric street railways in the United States. There are now over four hundred, and the number is rapidly increasing. It was not until 1888 that the electric railway became a practical commercial success, and the litigation that has arisen because of the utilization of electricity as a motive power upon street railways, dates from that time. The different methods of electric street railway construction, thus far attempted, are: (1) storage battery; (2) conduit system; (3) double trolley; and (4) single trolley. In order to comprehend the legal points involved in a large number of electric railway controversies, it is necessary to at least understand the main differences between these methods. The single trolley is the only one which has proved financially and commercially successful, but electricians are now at work endeavoring to perfect the storage battery, which is, of course, the ideal system.

1. The storage battery car is driven, as the name indicates, by electrical power stored in the car itself, but because of the rapid deterioration of the batteries, their great weight, and the necessity of frequently re-charging them, they have been almost entirely abandoned. They are now but little considered in the field of electric traction, except in reference to future possibilities. The storage batteries are practicable only upon those roads which are quite level. They have been tried on Madison Avenue, New York; Washington, D. C., and Dubuque, Iowa. The president of the road in the latter city has pronounced the storage battery a failure, and this was the unanimous opinion of the practical street railway operators at the convention of the American Street Railway Association which was held at Pittsburg, Pa., in November, 1891.

2. The conduit system, or underground method, i. e., where the continuous live conductor is placed in an open slotted conduit, is not as yet a success in this country, its fatal weakness being the inability of its operators to prevent the conduit from becoming filled with water, mud, etc.

3 and 4. The double trolley system is merely the single trolley without a ground return. In other words, in the double trolley system, a wire is used for the return of the current, while in the single trolley system, which is used on nine-tenths of the electric roads now in operation, the earth is used for a return circuit. This is a brief description of the four methods of electrical street railway construction, but there are few if any controversies which have come before the courts in which any company, other than those using the single trolley system, have appeared as parties. Therefore, in studying the law pertaining to electric railway disputes, the lawyer should be especially familiar with the single trolley system, not only because it is at present the prevailing system, but because the probabilities are that it will grow in favor and supplant all the other systems, unless more rapid progress is made in the perfection of the storage battery.

A very large majority of the electrical street railways now in operation were formerly horse railways. They have become electric railways merely

by changing the motive power. The legislature has the power to authorize the use of electricity under a general grant of power to operate and maintain street railways, provided the use of electricity does not create a nuisance, or, in other words, a street railway corporation takes by necessary and unavoidable implication, a right to use any force, as electricity, in the propulsion of its cars that may be fit and appropriate to that end. *Halsey v. Rapid Transit Ry. Co.*, Dec. 6, 1890, 20 Atl. Rep., 859. Although the law concerning electric railways is still in an unsettled condition, there can be seen a marked tendency in the decisions of the courts to favor the electric railway, and at least to place few obstacles in the path of its development. There seems to be a widespread prejudice against the use of electricity as a motive power on street railways, the objections being that it is a nuisance and dangerous. Very few cases have arisen in which the claim that it is a nuisance is the sole contention. The case of *Loneragan v. Lafayette Street Ry. Co.*, in the Circuit Court at Lafayette, Ind., decided July, 1890, by Langdon, J., is a case in point. The plaintiff, a blacksmith, complains of the electric car as a nuisance, but the court does not agree with him. In the case of *The Louisville Bagging Mfg. Co. v. Central Pass Ry. Co.*, in the Louisville (Ky.) Law and Equity Court, Taney, J., says: "So far as the plaintiff seeks to enjoin the operation of electric cars on the score that it is a public nuisance, the court will not listen to it." 10 Ky. Law Reporter, 591. In view of the rapid progress that the electric railway is making in public favor, it is improbable that many cases of this kind will arise. The prejudice against the electric railway is fast disappearing. The fears of its alleged dangerous properties are grounded in ignorance. There was a time when traveling in cars drawn by a locomotive was protested against as dangerous by the Royal College of Bavarian Doctors, and on November 28, 1833, the citizens of Philadelphia addressed a remonstrance, to the Select and Common Councils of the city, against "lighting the city with gas, as they consider it a most offensive, inexpedient and dangerous mode of lighting."

The burden of electric railway litigation has arisen over: (1) the rights of owners of abutting property, the claim being that the electric railway is an additional burden upon the highway; and (2) the liability of the railway to the telephone company for alleged interference by leakage and induction. These questions are being litigated in the courts at the present time. To be successful in the conduct of one of these cases, the lawyer should acquaint himself with at least the elements of electrical science.

THE COUNSELMAN CASE.

COUNSELMAN V. HITCHCOCK.—12 Sup. Ct. Rep., 195.

A decision was recently handed down from the Supreme Court of the United States which caused considerable comment by the press especially of Chicago. The facts in the case were, in brief, that while the grand jury, in attendance upon the District Court for the northern district of Illinois, was investigating certain charges made against the Chicago, Rock Island & Pacific R. R. Co., et al., for violating the Interstate Commerce Acts, Charles Counselman, a grain dealer, was called before the grand jury and requested to produce his books, showing his transactions with the accused R. R. Companies. This, Counselman refused to do, on the ground that such testimony would tend to criminate him. Whereupon, after a hearing in court, he was fined \$500 and imprisoned for contempt of court. Counselman then applied to United States Circuit Court for a writ of *habeas corpus*, which Judge Gresham ultimately refused to grant. Upon an appeal by Counselman to the Supreme Court of the United States, his writ was granted and finally sustained, thus reversing the decision of the Circuit Court.

The Interstate Commerce Acts provides that the aid of any court in the United States may be invoked to compel witnesses to produce books, papers and documents in an investigation of the management of the business of common carriers. It would seem that such provision is nugatory. The Supreme Court held that under the fifth amendment to the Constitution which declares that "no person shall be compelled in *any* criminal case to be a witness against himself," a person can not be compelled to disclose facts before a court or grand jury which might subject him to a criminal prosecution or his property to forfeiture. The Interstate Commerce Acts also provide that "the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying," and then hedges by saying that "such evidence or testimony shall not be used against such person on the trial of any criminal proceeding." But the Supreme Court holds that inasmuch as the statute makes the act of receiving less than the schedule rate a misdemeanor, that Counselman is entitled to the constitutional provision, that no man shall be compelled to testify against himself in any court of justice whether the prosecution be directly against him or not.

Whether Judge Gresham, giving as his interpretation of the Interstate Commerce Act, that the protection given by §860 of the Revised Statutes, viz.; that no evidence obtained from any party by means of judicial proceeding shall be given in evidence or in any manner used against him in any court of the United States, is co-extensive with that of the Constitution, was right in deciding that Counselman had no privilege in this case under the Constitution, we shall not presume to say; but that so far as lawyers are concerned, it is settled by every Bill of Rights since William and Mary, that no man can be compelled to criminate himself, and that the proper way to overrule the constitutional provision in question, is by amendment and not by legislation or by judicial construction, the Chicago press to the contrary notwithstanding.

J. E. R.

LATE DECISIONS OF THE MICHIGAN SUPREME COURT.

NICHOLS v. C. & W. M. R. R. Co.—*Decided Feb. 5.*—(Grant, J.)

Railroad Companies—Liability for Carrying Passengers beyond their Destination.—The plaintiff was a passenger from Newaygo to Otia, where he intended to alight, but was accidentally carried beyond. The court held, that no liability attaches to the defendant. It was the duty of the conductor or brakeman to call out the stations which they did, but not their duty to awaken the plaintiff, who was partially intoxicated, and to assist him to alight. The plaintiff is barred from recovery by his own acts of negligence.

YERKES et. al. v. NORRIS.—*Decided Feb. 5.*—(Grant, J.)

Assumpsit—Payment—Evidence—Questions for Jury.—Action to recover balance claimed to be due plaintiffs, co-partners, from defendant. The defense set up payment through an order signed by one of plaintiffs. Evidence of plaintiff tended to show that the amount was paid on an old bill to one of plaintiffs, with which the present firm had nothing to do. Defendants evidence tended to show that it was paid upon the bill in dispute. *Held*, that it was properly submitted to the jury to determine whether the payment was made upon the old bill or upon the bill in suit.

BRITTON v. STREET RAILWAY COMPANY OF GRAND RAPIDS.—*Decided Feb. 5.*—(Morse, Ch. J.)

Street Car Companies—Liability for Injury to Passengers while Alighting—Negligence of Driver—Instruction to Jury.—Action for injuries received while alighting from a street car alleged to have been caused by the negligence of the driver. *Held*, that the court erred in instructing jury on points not before the court or on immaterial points of law; that it is the duty of the driver to use reasonable diligence to see that all passengers have safely alighted before restarting the car, and then to see that the car is started with reasonable care, and not in a sudden or violent manner.

LOBDELL v. SLAWSON.—*Decided Feb. 5.*—(McGrath, J.)

Partnership—Set Off.—The court summed up the evidence, and held, that on May 14, 1888, one of the defendants, Lobdell, who was a co-partner with Slawson, transferred to his wife, the plaintiff; notes, etc., of the face value of \$625 00, on which the plaintiff realized the sum of \$465. She had been informed by the defendant, Slawson, that the firm was relying on these notes as assets for the payment of debts, but no entry was made on the books, for reasons shown. The plaintiff paid no consideration for said notes, and the defendants are entitled to credit for the same, and are entitled to it by the set off of May, 1888, for the sum of which the plaintiff realized thereon, viz. \$465, with interest. Judgment was therefore affirmed.

COLLINS v. SWENSBERG.—*Decided Feb. 5.*—(McGrath, J.)

Contract—Construction of Terms—Delivery of Goods on Trial.—Plaintiff doing business at Chicago, called upon defendants at Grand Rapids, and by written agreement, dated at the latter place, agreed to place an improved cleaning filter on defendants' boiler on trial for one year; to be returned at the expiration of that time if not satisfactory. About four months later defendants notified plaintiffs that they did not want the filter. Plaintiffs did not reply but later one of the firm called on defendants and the latter renewed their statement that they did not want it, and showed him the box containing the filter which they said was at plaintiffs' disposal. No further communication was had until more than a year afterwards when plaintiffs demanded payment but defendants refused and shipped the filter to plaintiffs. The latter refused to take it from the railroad company, and brought suit to recover its value, claiming that defendants had not returned the filter within the year as agreed. *Held*, that the contract having been entered into at Grand Rapids, and plaintiffs having delivered the filter to Grand Rapids, and no provision being made

as to payment of freight to Chicago, the defendants had fulfilled their contract by placing the filter at plaintiffs' disposal within the time limited, and by offering to deliver to such railroad depot in Grand Rapids as plaintiffs should designate.

SCHULER V. ECKERT.—*Decided Feb. 5.*—(Morse, C. J.)

Action on Building Contract.—Plaintiff's contracted with defendant to build a house, according to specifications of an architect, etc., stipulating in the agreement that if he should fail to *comply* with any of the articles of agreement, the defendant, after giving forty eight hours notice, in writing, could terminate the contract, whereupon all claims of the contractors, etc. etc., should cease. Upon the neglect and failure to follow the plans and specifications the defendant gave notice and took possession of the building and completed it. The circuit judge found that the defendant had a just cause for so doing and Supreme Court, holds that this makes it unnecessary to consider whether damages could have been recouped under a plea and notice, as none were claimed or rewarded on the trial.

STEERE V. VANDENBERG.—*Decided Feb. 5.*—(Montgomery, J.)

Replevin—Title necessary to be Shown by Defendant—Rights of Defendant having only Special Interest.—Plaintiff brought replevin for a stock of drugs. *Held*, that a defendant in replevin in order to show himself entitled to a judgment for the value of the goods replevied, need not, in addition to showing possession under a claim of title, prove that he has a title against all the world, when no right or title whatsoever appears in the plaintiff. A party with a special interest only, may, as against a stranger, recover the full value of the property and become trustee to the general owner for his interest. (Davidson v. Ganssolly, 1 Mich., 383; First National Bank v. Crowley, 24 Mich., 492; Darling v. Tegler, 30 Mich., 54; Wells on Replevin, §§ 692-694.)

SABIN V. THE SENATE OF THE NATIONAL UNION.—*Decided Feb. 5.*—(Morse, C. J.)

Insurance—Construction of By-Laws—Suicide.—A by-law of the Griswold Council No. 15, National Union, located at Detroit, Michigan, is as follows: "No benefit shall be payable on account of the death of any member who commits suicide within two years after becoming a beneficial member whether the member at the time of committing suicide be either sane or insane." *Held*, to be a part of the contract of the insured and insurer; and where such insured commits suicide his personal representatives are not entitled to recover the amount of insurance. The case of Streeter v. Western Union Mutual Life and Accident Society, 65 Mich., 199 followed.

DANIELS V. WEEKS.—*Decided Feb. 5.*—(Morse, Ch. J.)

Replevin.—Eight hogs had been transferred to the plaintiff, whereupon a writ of attachment was levied upon them by the defendant, claiming that the transfer was intended to defraud him of a debt due. Before the writ was served the plaintiff butchered the hogs, but they were taken from him under the writ. It was claimed by counsel that prejudicial error was committed in rejecting the question: "Then is it not correct, 'as your father testified,' that etc.?" The circuit judge objected to that part of the question quoted, and refused to admit the question unless these words were ruled out. Other similar points in the cross examination came up, but the court held, that under claim of fraud the defendant's counsel were entitled to great latitude upon cross examination of the plaintiff, and since no prejudicial error is perceptible, the judgment is affirmed with costs.

WOOD V. MICHIGAN AIR LINE R. R. Co.—*Decided Feb. 5.*—(Montgomery, J.)

Trespass—Statute of Limitations—Possession.—Action of trespass for entering plaintiff's premises and maintaining and operating a railroad thereon with his license and against his will. It appeared by the testimony that the defendant entered upon the lands, and maintained its road continuously since December, 1883, and that the entry had been made under an instrument claimed by the defendant to amount to a license. *Held*, that the right of action in trespass for the original disseizen having become barred by the statute, the remedy by trespass cannot be given for acts of defendant committed while in full possession of the premises. The owner may rely upon his constructive possession of lands not actually occupied and recover both for unlawful entry and continuing possession, if the action is brought within two years after the original entry; but he cannot lie by until the right of action based upon the original disturbance of his possession is barred, and

maintain an action distinctively based upon the disseizor's continued holding. Possession in the plaintiff, either actual or constructive, is essential. (*Ruggles v. Sands*, 40 Mich., 560; *Carpenter v. Smith*, 40 Mich., 639.)

COOK V. FIRST NATIONAL BANK OF MENOMINEE.—Decided Feb. 5.—(Long, J.)

Bill of Sale.—Admissibility of Oral Agreement to Vary the Terms of a Written Instrument.—Plaintiffs gave Peters & Morrison a bill of sale of certain logs which upon its face conveyed all the title to the logs to said Peters & Morrison. The latter gave a bill of sale of the same to defendant. Plaintiff brings replevin and sets up that there was a reservation of the title to him; that the clause was unintentionally omitted from the written instrument. That the mistake was noticed after the contract was signed and that the vendees agreed that the contract be treated as though it contained the stipulation agreed upon. Held, that the proceedings constituted one transaction, and failing within the well-known rule that written instruments are not to be changed or waived by contemporaneous parol agreements.

JOSLIN V. GOEBEL.—Decided Feb. 5. (Long, J.)

Assignment for Benefit of Creditors—Fraudulent Conveyance—Conveyance between Husband and Wife.—Defendant made an assignment to complainant for the benefit of creditors, purporting to convey all his property which was not exempt. Schedule of assets was filed. Creditors claimed that certain assets were not enumerated, but fraudulently held by the wife, and bill was filed to recover them and subject the assets to payment of claims of creditors. Defendants claimed that conveyance was made on consideration of advances made to husband by the wife. Held, that conveyance was good; but that as the amount of the advance did not equal the value of the property, the difference between the actual value of the property and the amount of the loans and advances made by the wife will be construed to be unpaid purchase money, and must be considered as assets.

HUTCHINSON V. WHITMORE.—Decided Feb. 5.—(Long, J.)

Declaration—Writ of Execution—Executions under Statute—Inventory.—Where a declaration sets forth that the plaintiff's principal business was that of farming, and the property levied upon and sold under a writ of execution by the agent or deputy of the defendant, a *Sheriff*, consists of hay, oats, corn, seed, a heifer, two spring calves, etc., etc., the court held that such allegations are sufficient to allow proof upon the trial that such property is exempt from execution by Howell's Stat. sec. 26, subdivision 8, Chap. 266. Held, also that part of the decision in *McCoy v. Brennan*, 61 Mich., 362; which is in reference to the declaration is mere *obiter*. Held, also that an officer making a levy on goods any portion of which is exempt under the law, must make an inventory and appraisal and call upon the owner to make a selection or to set out any exemptions. *Wyckoff v. Wyllis*, 8 Mich., 47 and *Stillson v. Gibbs*, 46 Mich., 215 followed.

VILLAGE OF ESSEXVILLE V. EMERY.—Decided Feb. 5.—(Long, J.)

Highway—Title by User—Adverse Possession by Individual.—Bill filed to compel defendant to move his fence from what is claimed to be a street. Complainant claims that defendant's fence encroaches upon the street; that the street was laid out as a highway in 1857; that the owners of the lands made a plat of the same in 1870, and placed it on record: that the north line of said plat is the south line of said street; that the title of defendant is derived through conveyance describing the property by reference to such plat, and that he has built a fence eight feet north of the north line of his lots and enclosing that much of the street. Defendant admits that the land was platted, but denies that it was dedicated to public use, and avers that his fence has been built eighteen years, and that her and his grantors have had possession of the strip for upwards of twenty-two years. Held, that the title of the defendant had become absolute by open, continuous, adverse possession.

SMITH V. SMITH.—Decided Feb. 5. (Long, J.)

Bill to Set Aside Deed—Conveyance Obtained by Undue Influence—Adequate Consideration—Bona Fide Purchasers.—Bill to set aside quit claim deed made October 6, 1873, by Samuel Smith to his son, Chauncey Smith, on the ground of undue influence and mental incapacity of the grantor. Bill is filed by Frances Smith, widow of Samuel Smith, and all the children except Chauncey and Hiram, who are made defendants together with Walter Wing, who claims to be a bona fide holder. The evidence was somewhat conflicting, but it was proved that Samuel Smith showed signs of mental incapacity shortly after returning home from the war, and became unable to transact business; that his sons Chauncey and Hiram

gave him liquor to drink, contrary to the wishes of the rest of the family, and Chauncey induced him to come and live in his house, and while there the deed was obtained. Soon afterwards, he compelled his father to return home. He claims that the deed was made on consideration of money advanced to the father, but the complainants allege that this claim was settled by allowing the use of the farm for a certain time. During the next year, after Samuel returned to his home, he filed a bill to have the deed set aside, but was induced to drop the case. After these proceedings, part of the land was deeded to Wing, the other portion having already been conveyed to Hiram. *Held*, that the deed was obtained by fraud and undue influence, and that neither Hiram Smith nor Wing were bona fide purchasers of the property. Decree was entered setting aside the deed:

MILLER V. SEELEY.—*Decided Feb. 5.*—(Montgomery, J.)

Agents—Personal Liability—Negligence.—Plaintiff negotiated a loan of \$6,000, through the agency of defendant, who acted for a resident of New York. When the mortgage became due it was forwarded to defendant, who handed it to certain attorneys to foreclose. After they had proceeded to decree plaintiff paid defendant \$74 who forwarded it to the owner of the mortgage, and notified the attorneys, who in turn notified the solicitor for Miller in the foreclosure proceedings. The amount of the payment was not, however, actually indorsed on the decree, and on the foreclosure sale was bid in at a price substantially equal to the full amount of the decree. Plaintiff seeks to recover the amount of payment from the defendant. *Held*, that an agent cannot be held for a failure of principal to apply the money collected in reduction of the indebtedness represented by the decree if he promptly transmitted the money. (*Granger v. Hathaway*, 17 Mich., 500; *Bailey v. Cornell*, 66 Mich., 107). And under the circumstances defendant was not guilty of such negligence as renders him liable as a matter of law.

MALLORY V. OHIO FARMERS' INSURANCE CO.—*Decided, Feb. 5.*—(McGrath, J.)

Insurance Policy—Cancellation—Liability for Loss.—Action upon a policy of insurance. Policy was issued July 3, 1890; building burned August 31, 1890. One Root was the general agent of the company at Grand Rapids, but the policy was obtained by plaintiff from a special agent, Bodwell, who acted under Root. The latter was the person through whom the company acted, and by him only could the cancellation be made. It was claimed that such cancellation had been made, but the plaintiff contended that the policy had never been in Root's hands, that it was only placed in Bodwell's hands for the purpose of securing a new policy should that one be cancelled. Bodwell kept possession of the policy and assured plaintiff that the property was still insured, and this assurance was repeated a short time before the fire. *Held*, that these assurances given from time to time up to within a few days of the fire, by one whose duty it was to collect the premium, and who had given the credit in the first instance, cannot be regarded as less than an indefinite extension of time, and before the company can take advantage of a failure to pay, they must show a demand made and a failure to pay.

FACE V. CITY OF IONIA.—*Decided Feb. 5.*—(Morse, Ch. J.)

Liability of City for Injuries Caused by Defective Public Alley.—Action for damages for injury caused by falling into an area built by a private person within the limits of one of the public alleys of Ionia, and which was constructed in an improper manner. The alley was laid out as a private alley, but by uninterrupted use for a number of years the public gained a right of passage which the lot owners adjoining cannot interfere with nor destroy. *Held*, that though the public may have gained a right to use the alley, yet it is not a "public highway" in such a sense as to subject the city to the statutory liability for injuries received upon it. There is no liability created by statute for injuries received by reason of alleys being out of reasonable repair and unsafe for travel, and the common law imposes none. (*Paul v. Detroit*, 32 Mich., 111; *Beecher v. People*, 38 Mich., 291; *Bagley v. People*, 43 Mich., 355; *Campau v. Board of Public Works of Detroit*, 49 N. W. Rep., 59.) Even a public alley in this state is not a public highway in the sense of the statute under which plaintiff seeks to recover, and there is now no law in the state making it the duty of the city to keep its alleys in good or reasonable repair, or reasonably fit for public travel.

WINTER V. WINTER.—*Decided Feb 5.*—(Grant, J.)

Wills—Subsequent Conveyance of the Property.—The plaintiff died in 1887, leaving as his sole heirs his wife and three children. Before his death, however, he disposed of his property by deeds to his son John Winter and his wife. The heirs-at-law instituted proceedings to set aside the conveyances, and thereupon the mother

reconveyed to them the property for \$500 cash and \$300 for a monument. In three years Mrs. Winter died, leaving a will by which she devised her property to her sons. Her daughters contested the will, but it was duly admitted to probate, and thereupon they presented a claim against the estate for \$900. The commissioner allowed the claim of \$500, when the executor appealed, and in the circuit court verdict was directed for the executor. Preliminary objections were overruled, and it was held that no claim is made for the \$300, but the contestants insist that the \$500 was merely a loan, and that their mother promised it should be returned at her death. The court said: "If we grant all that was said, it did not create the relation of debtor and creditor between them. All this happened before the execution of the deed. This \$500 became the sole property of Mrs. Winter, and the circuit court was correct in directing a verdict."

HUBBARD V. PRESTON.—*Decided Feb. 5.*—(Long, J.)

Killing of Dogs—Nuisance—Questions for Jury.—Action against defendant for killing plaintiff's dog. Defendant lived on Bagg street, Detroit, and did not keep a dog. For eight days prior to the shooting he and his family had been greatly annoyed by the congregation of a large number of dogs about his premises, barking and fighting, and keeping up their cries all night. He complained to the police without relief, and could not keep the dogs from congregating. He drove them away twice that one night but they returned, when he went out and shot among them, not knowing who owned any of them, and not shooting at any particular dog. Plaintiff's dog was shot. *Held*, that the defendant had a right to protect himself from such nuisance; and it was a question for the jury whether he used such means as were reasonable and necessary and the circumstances to rid himself of it.

HEMINGWAY V. BURNHAM.—*Decided Feb. 5.*—(Montgomery, J.)

Construction of Contract—Suits Between Partners—Special Questions to Jury.—Plaintiff and defendant were co-partners engaged in the business of manufacturing lumber. Plaintiff owned the saw-mill which was used in the business, and by the agreement between them plaintiff leased defendant one-half his mill for a certain price and agreed to put in a certain amount of stock for their joint use in the manufacture of lumber. *Held*, that the contract might be properly construed as an independent letting or leasing, entitling the plaintiff to receive of defendant the amount agreed upon for the use of the mill; but that the subsequent dealings of the parties might have been such as to constitute this transaction as a portion of the partnership dealings. And it is the duty of the court to allow special questions touching these matters to be submitted to the jury. (Cole v. Boyd, 47 Mich., 98; Mechanic's Bank v. Barns, 86 Mich., 632; Kelley v. D. L. & N. R. R. Co., 80 Mich., 237; Sherwood v. C. & W. M. Ry. Co., 82 Mich., 374.)

LADD V. FLYNN.—*Decided Feb. 5.*—(Long, J.)

Injunction—Line-Fence—Abatement of Nuisance—Motion of Preliminary Injunction—Setting Aside Order.—Bill was filed to obtain abatement of a line fence erected by defendant, and to perpetually enjoin him from erecting or maintaining a similar one. Defendant's and complainant's houses are about two feet apart. Complainant alleges that defendant maliciously erected a board fence sixteen feet high, shutting off the light from complainant's windows. Defendant admits building of the fence, but claims it was to screen his tenants from the view and unpleasant observation and comment of complainant's tenants. Motion for preliminary injunction was made at the time of filing the bill and granted and an order granted commanding defendant to abate the nuisance and perpetually enjoining him from rebuilding. Upon this an injunction was granted as directed by this order. *Held*, that the court had no power to determine the rights of the parties on affidavits or on motion for preliminary injunction, but only upon final hearing; and the injunction must be set aside.

DWELLING HOUSE INS. CO. V. JOHNSTON, et. al.—*Decided Feb. 5.*—(McGrath, J.)

Surety—Rights of, After Default of Principal—What Acts will Discharge Surety.—Defendant Johnston was the agent of plaintiff at Grand Rapids. Defendants Forbes and Austin were the sureties on his bond to the company. Johnston made default in settlement of his account, and in December, 1888, his sureties were compelled to pay a balance due to the company. Sureties claim that they then wrote the company that they would not be responsible on Johnston's bond further unless monthly settlements were thereafter made. Plaintiffs claim not to have received the letter; that they wrote sureties in December, 1889, and received an answer denying their responsibility. *Held*, that if the company had not received the first letter

from sureties that it could hold them liable until the letter of December, 1889; that if plaintiff did receive the notice given by sureties that they would not be responsible unless monthly settlements were made, and failed to take the steps requested by the sureties, that the latter were discharged. A surety may be discharged by the doing of an act which is legally injurious to the surety, or which impairs his legal rights, or the omission to perform a duty when required by a surety, which omission results in injury to the surety. (*Clark v. Sickler*, 64 N. Y., 231.)

HANSELMAN V. DOYLE, ET. AL.—*Decided Feb. 5.*—(McGrath, J.)

Assumpsit—Set-Off—Notice to Produce—Parol.—Plaintiff brings assumpsit for goods sold and delivered. Defendants, partners, plead general issue and gave claimed as set off a balance due Moon, one of the partners which had been assigned to the firm. Hanselman had previously owed Moon \$1,080 on a note; being unable to pay he made arrangements with one Rosenbaum to secure payment. He accordingly gave Moon merchandise and due-bills to the amount of \$575, indorsed notes of Hanselman to Moon to the amount of \$300. Moon then delivered the note to Hanselman on the latter's promise to pay the balance \$205. *Held*, that this was a proper claim for assignment and set-off. The note being in plaintiff's possession could not be produced, and although the better practice is to give notice to produce before trial, yet the reasonableness and sufficiency of the notice depends upon the circumstances of each case and is a matter for the court. The note being merely the foundation of the claim reference to it by parol for the purpose of showing consideration for the mere promise was competent, and the existence of the paper may be shown by parol.

CARPENTER V. MYERS.—*Decided Feb. 5.*—(Grant, J.)

Attorney and Client—Agreement for Compensation for Judgment Obtained.—Right of Attorney to Continue Proceedings after Settlement by Stipulation.—Plaintiff brought suit to recover labor claims. He made a contract with his attorney by which the latter was to receive twenty per cent. of the amount recovered, and to secure him plaintiff assigned to him his interest in the suit. Defendants had notice of the assignment. Subsequently plaintiff and defendants settled the suit, and signed a stipulation consenting to a dismissal of the case. Defendants retained enough to pay attorney but neither tendered the amount nor paid it into court. Plaintiff's attorney claimed right to proceed to trial notwithstanding the stipulation, and after introducing testimony moved for judgment which was denied, the lower court holding that the case was discontinued by the stipulation. *Held*, that this was a final determination which might be properly brought up by a writ of error; that judgment should be entered for the amount retained for plaintiff's attorney, and until paid no valid discharge of judgment could be made. *Weeks v. Wayne Circuit Judge*, 78 Mich. 276, followed.

RACHO, ADMINISTRATRIX, V. CITY OF DETROIT.—*Decided Feb. 5.*—(Morse, Ch. J.)

Damages for Injuries on Highways—Right of Personal Representatives to Recover—Act of 1887 construed.—Andreas Racho was injured by being thrown from his wagon while driving on a street in Detroit, from which injuries he died. The injuries were caused by the neglect of the municipality to keep the pavement in good repair and in reasonable condition for travel. He presented claim for damages but no action was taken by the council on his claim during his life-time. Julianna Racho, his wife, brings suit as administratrix, claiming damages in the declaration "for the benefit of her, the said plaintiff, the wife of said Andreas Racho deceased." The defendants contended that the plaintiff had no such right of action; that Act No. 264, Public Acts of 1887, made no provisions for damages to next of kin or the estate of a deceased person which may be recovered by an administrator; and that the general law on the subject was abrogated by this act. *Held*, that by the provisions of the act it was intended only that no *living* person should recover for his bodily injuries except under or by virtue of the Act; but there is no express or implied declaration that in case such person shall die of such injuries, the right of action shall die with him. The Act does not affect the right of personal representatives to recover under the general law, as in other cases of negligent injury.

CROW V. CONANT.—*Decided Feb. 5.*—(Grant, J.)

Bill to Enjoin Foreclosure—Appointment of Mortgagor as Executor—Assets of Estate—Rights of Legatees—False Warranty—Negligence of Vendee—Remedy at Law.—Defendants, by the will of one Lewis, became the owner of a certain mortgage given by one Nichols, who was also made an executor of the will by its provisions. Nichols subsequently sold the mortgaged property to plaintiff and gave him a warranty deed, representing that the property was unincumbered. Defendant

instituted foreclosure proceedings by advertisement. Bill filed to enjoin foreclosure proceedings. *Held*, that the appointment of a mortgagor as an executor did not operate to discharge the mortgage nor the lien upon the land, but that the mortgage became assets of the estate in the hands of the executors, to be inventoried and treated as other assets of the estate, and the assignment thereof to the defendant vested the legal ownership in the defendant. (Werner on Executors, § 512; Kinney v. Ensign, 18 Pick., 232; Loverhill v. Snyder, 59 N. Y., 140.) The complainant, by neglect to examine the record, put it in the power of Nichols to commit the fraud, and must bear the consequences. A mortgagee acquires no interest in an equity of redemption except by foreclosure; and the appointment of the owner of an equity of redemption as executor does not make it an asset of the estate. Complainants have a complete remedy at law upon Nichols' warranty of title. It affords no ground of equitable relief that Nichols has absconded and left no property which can be seized to satisfy complainant's damages.

HARROW SPRING COMPANY V. WHIPPLE HARROW COMPANY.—*Decided Feb. 5.*—(Montgomery, J.)

Assumpsit—Recoupment—Contract—Construction—Measure of Damages.—Action to recover for harrow-teeth furnished by plaintiff to defendant. The defendant sought to recoup damages on ground that teeth were not of the quality contracted for, and for failure to furnish the teeth within the time contemplated. The written proposition of plaintiff, and accepted in writing by the defendant was: "We will agree to furnish you with 28,000 harrow teeth, of your regular patterns, such as heretofore furnished, at 4¼ cents per pound." *Held*, that the words "such as heretofore furnished" referred to the quality of the teeth previously furnished as well as to the patterns.

The contract requiring manufacture and shipment within a reasonable time after being informed as to the goods required, it is not competent to show by parol any other or different agreement relating to the time when the shipments were to be made. (T. & A. A. R. B. Co. v. Johnson, 55 Mich., 461; Coon v. Spaulding, 47 Mich., 162; Strange v. Wilson, 17 Mich., 342.) But the plaintiff may recover damages for failure to deliver within the reasonable time contemplated by the contract, and is entitled to recover for expenses incurred, in good faith, in anticipation of performance by the other party. (1 Sutherland on Damages, 110; Mann v. Taylor, 43 N. W. Rep., 220; U. S. v. Vehan, 110 U. S., 338.)

CLINK V GUNN.—*Decided Feb. 5.*—(Long, J.)

Trover—Demand—Evidence—Admissibility of Court—Files—Abuse of Witness on Cross-examination.—Plaintiff had been the owner of 320 acres of lands in Fruitport Township, Muskegon County, upon which one Williams held a mortgage. Subsequently plaintiff made a deed of the land to Williams and took back an agreement to re-convey. Williams sold the land to Gunn, defendant; but the court of chancery held it a mortgage and decreed a re-conveyance. After the deed was made to Williams, plaintiff made a bill of sale of the timber on the land to one Hefferon. This bill of sale was assigned by Hefferon to Williams and by the latter to Gunn. Plaintiff also owned 22 acres of land adjoining upon which was a mill-pond containing a quantity of saw-logs. Defendant took these logs as well as the timber from the 320 acres. Plaintiff brought action of trover and recovered in court below. Defendant assigns several grounds as error. *Held*, that the files of the chancery case were admissible in evidence in this case; that no demand was necessary before bringing the action, and that the value of the logs should be shown by the market value in the pond. But it was also held, as the defendant claimed to have acted bona fide on the assurance from Williams that the logs in the pond were included in the bill of sale, that an unwarranted abuse of the right of cross-examination which tended to prejudice the jury against Williams' testimony should not be permitted, and if allowed by the court below is ground for error. Decision reversed and new trial ordered.

HARRIGAN V. WYMAN.—*Decided Feb. 5.*—(Montgomery, J.)

Promissory Note—Bona Fide Holder—Instructions to Jury—Error in Instructions.—Action on a promissory note given by defendant to one William S. Moore. It is claimed that the note was fraudulently obtained by one Roberts from Moore, and that Moore shortly afterwards gave notice to defendant of the fact, and it appears that Moore has undertaken the defense of the present case. Roberts transferred the note to Rockwood, who in turn transferred it to Wood. The plaintiff brings the action as the authorized agent of Wood. Defendant offered evidence tending to show that the note was fraudulently secured by Roberts and that Rockwood knew of the fraud. Two or three exceptions were taken to the instructions by the court.

Held, that an instruction that "to enable the plaintiff to recover he must show that before the note became due it passed into the hands of some innocent holder for value," is a good charge as applied to a case in which the question arises between the holder and the maker, who alleges a fraud perpetrated upon him. (Patton v. Coit, 5 Mich., 506; Conley v. Winsor, 41 Mich., 253; Carrier v. Cameron, 31 Mich., 373; Manistee National Bank v. Seymour, 64 Mich., 69; Mace v. Kennedy, 68 Mich., 389.) And the instruction is equally proper when the question arises between the payee and the present holder. (Barnes v. Peet, 77 Mich., 396; Union National Bank v. Barber, 56 Iowa, 559; Matthews v. Pathress, 4 Ga., 289; Garrard v. Pittsburg R. R. Co., 29 Pa. St. 155; Easton v. Allen, 8 Allen, 7.) *Held*, also, that it is error to submit to the jury a question not in controversy upon the testimony. (Lange v. Perley, 47 Mich., 352; Corbett v. Spencer, 67 Mich., 731; Gavigan v. Evans, 45 Mich., 597; Hunt v. Supreme Council of Chosen Friends, 64 Mich., 671.)

READ V. HORNER.—*Decided Feb. 5.*—(Long, J.)

Chattel Mortgage—Contracts in Nature of Chattel Mortgage—Notice of Prior Mortgage.—Action on the case for value of a building removed by defendants from plaintiffs premises. Defendants pleaded general issue and gave notice that they were the owners of the shop and had a right to remove it. Former owner of the premises had based a portion of the premises to one Stanbaugh for ten years for the purposes of erecting a blacksmith shop thereon, the shop to remain the property of Stanbaugh. The latter assigned to Greenman who sold to Hiland Read, plaintiff's husband who entered into an agreement to pay for the building within a certain time, and in case of default all payments to be forfeited and the title to the building to revert in Greenman. Greenman assigned his interest to defendant; Read assigned his interest to defendant, his wife, who had also acquired the title to the premises. But Read had made default in payment by the terms of the contract and defendants claim that his interest in the building had been forfeited. *Held*, that the transaction was in effect a chattel mortgage; that the plaintiff had notice of the lien, and that defendants might remove the building but were liable to the plaintiff for the amount of the value of the building above the amount of their lien. One is not a purchaser in good faith who has actual knowledge or notice of a chattel mortgage lien, though the mortgage has been filed. (Dempsey v. Pforzheimer, 86 Mich., 652; Doyle v. Stevens, 4 Mich., 87; Sayre v. Hewes, 32 N. J. Eq., 652; Gildersleeve v. Landon, 78 N. Y., 609; F. L. & T. Co. v. Henderson, 25 Barb., 484; Morse v. Simonds, 10 U. S., 145.)

ALLIS ET AL. V. VOIGHT ET AL.—*Decided Feb. 5.*—(Long, J.)

Construction of Contract—Special Carriers—Liability for Injury in Transportation—Right of Principal to Limit Authority of Agent.—Plaintiffs contracted with defendants to put in certain machinery in defendants' mill. The contract contained the following clause: "The above machinery to be erected in Crescent Mills, Grand Rapids, Michigan, without expense to you, except that you shall do all teaming required in Grand Rapids and furnish all mason and carpenter work." Defendants furnished men and teams, who acted under the supervision of one McDonald, the agent of plaintiffs, who directed the removal of the machinery. A fly-wheel was broken. Plaintiffs claim that defendants were the carriers of the machinery from depot to mill and liable for loss or injury during transfer. Defendants claim that they are special carriers only, and that the plaintiffs, by their agent, had undertaken the supervision of the transferring of the machinery and were responsible. *Held*, that the defendants were not common carriers, and had contracted only as special carriers. They could therefore be held liable only for negligence, and are bound to use ordinary care only. (Sheldon v. Robinson, 7 N. H., 157; Shaw v. Davis, 7 Mich., 318; Samms v. Stewart, 20 Ohio, 70; Allen v. Sackrider, 37 N. Y., 341; Fish v. Clark, 49 N. Y., 122; "The Dan," 40 Fed. Rep., 691; Anon v. Jackson, 1 Hayw., 14; Brind v. Dale, 3 C. V. P., 207; Penniwell v. Cullen, 5 Harr., 238; Pike v. Nash, 1 Keys, 335.) The plaintiffs were liable for the acts of their agent McDonald within the scope of the business and cannot limit his authority by private instructions not known to the defendants. (Hutchins v. Ladd, 16 Mich., 493; English v. Ayer, 79 Mich., 516.)

MINNOCK V. EUREKA FIRE & MARINE INS. CO.—*Decided Feb. 5.*—(McGrath, J.)

Insurance Policy—Insurance for Benefit of Mortgagee—Notice of Special Defense and General Issue—Amendment of Plea—Written and Printed Clauses in Policy—Dealings with Agent—Effect of foreclosure of Mortgage on the Insured Premises.—Action upon a Fire Insurance Policy. *Held*, that the mere fact that insurance is made for benefit of mortgagee does not prevent the mortgagor from recovering on the policy. (Hartford Ins. Co. v. Davenport, 37 Mich., 608; Van Buren v. Ins. Co., 28 Mich., 397-404; Insurance Co. v. Lumber Co., 31 Mich., 345.) By a failure to give

notice of a special defense under the plea of general issue, it will be presumed that such defense has been waived. (*Insurance Co. v. Curtis*, 31 Mich., 401-403.) The discretion of a trial court in denying a motion to amend a plea will not be reviewed unless that discretion has been abused. (*Sauvais v. Leavitt*, 53 Mich., 577.) When a written and printed clause appear in a policy of insurance, relating to the same subject, the former in a prominent place, and associated with the other written provisions of the policy, and the latter in small type and therefore obscure, the intention of the parties will be sought for in the written provision rather than in the printed. The applicant for insurance has a right to rely upon the representations of the insurance company's agent, and in the absence of fraud may generally deal with him as he would with the officers of the company. (*Richards v. Insurance Co.*, 60 Mich., 420-427; *Insurance Co. v. Earle*, 38 Mich., 148; *Castner v. Farmers' Ins. Co.*, 50 Mich., 273-275.) Where it is provided by a clause in the policy that it shall be void "upon the passing or entering a decree of foreclosure," if the company had actual notice of the existence of the mortgage, no proceedings short of the decree will invalidate the policy; mere commencement of foreclosure proceedings will not annul the policy. (*Insurance Co. v. Lewis*, 30 Mich., 40.)

CLARK V. LANDON ET. AL.—*Decided Feb. 5.*—(Morse, Ch. J.)

Deed—When Conveyance Construed as a Mortgage.—Complainant was the owner of certain lands in the city of Niles. Being involved in debt he conveyed his property to one Wickham, the consideration being the amount of his mortgaged indebtedness which Wickham agreed to pay. Wickham re-sold to Clark by land contract. Clark failed to pay for the land within the time stated in the contract. Portion of land was sold, and Wickham subsequently died, bequeathing balance of the land to his children. Clark brings bill to have the original transaction between him and Wickham decreed to be a mortgage and that he may be admitted to redeem. *Held*, that the original transaction, i. e., the deed and land-contract amounted to a mortgage, and redeemable as such, and that Clark might redeem the whole property with the exception of the portion sold to a bona fide purchaser, by paying the amount found due on the contract after deducting payments made by the complainant, and further deducting the amount received by the defendants for rents and profits and for the land sold.

A deed with a bond or agreement to reconvey the estate upon the payment of a certain sum of money or upon the performance of some other condition, constitutes a legal mortgage if the instruments are of the same date, or are executed and delivered at the same time, and as one transaction. When a deed and defeasance are executed at the same time it is a conclusion of law, in absence of proof showing an intent to the contrary, that they constitute a mortgage. (Cited: 2 *Jones on Mort.*, 244; *Swetland v. Swetland*, 3 Mich., 482; *Batty v. Snook*, 5 Mich., 233; *Enos v. Sutherland*, 11 Mich., 538; *Ferris v. Wilcox*, 51 Mich., 106; *Jeffery v. Hursh*, 58 Mich., 482.)

KELLY V. GARTNER, Judge.—*Decided Feb. 10.*—(Per Curiam.)

Witness in Chancery Case—Examined in Open Court.—A party cannot demand an examination in open court of witnesses in a chancery cause until the cause is at issue as to all the parties. (Cited, *Hall Lumber Co. v. Gustin*, 54 Mich., 624.)

TOWNSHIP OF HIAWATHA V. SCHOOLCRAFT CIRCUIT JUDGE.—*Decided Feb. 10.*—(Per Curiam.)

Mandamus to Vacate Order—Decree Omitting the Words "Without Prejudice"—Amendment of Decree.—Decree was orally announced dismissing a bill without prejudice. The decree was drawn and signed and enrolled omitting the words "without prejudice." The court afterwards made an order on motion, amending the decree to conform to his oral announcement. Application for mandamus to vacate this order denied.

MOORE V. AUDITORS OF WAYNE CO.—*Decided Feb. 10.*—(Per Curiam.)

Mandamus—Salaries of Deputy Game and Fish Wardens—Power of Board of Auditors to Change.—Moore is a regularly appointed deputy game and fish warden for Wayne County. May 23, 1887, the Board of Auditors fixed their salary of the office at \$1,000 per year, which salary was continued up to Jan. 1, 1892. The board fixed the salary for the present year at \$300. Relator asks for a writ of mandamus claiming that the board after fixing the salary at \$1,000 have no power to change it. The act by virtue of which the relator held his office provided that such officers shall receive such compensation as the Board of Auditors may allow. *Held*, that the compensation may be fixed by the members of the board for each year at such sums as to them may seem proper.

PETRIE v. MUSKEGON CIRCUIT JUDGE.—Decided Feb. 10.—(Per Curiam.)

Mandamus—Production of Books for Examination.—Writ of mandamus granted vacating the order of the circuit judge denying the application of relator to have the books containing the account of a certain lumber transaction deposited in the court. Court below directed to hear the application and make such order as will give the relator a full and fair opportunity to examine such books of account before the hearing of the accounting so that he can prepare himself therefor.

KETCHAM v. WAYNE.—Decided Feb. 10.—(Per Curiam.)

Mandamus to Compel Delivery of Books, etc., to Successor in Office.—Relator is treasurer of the village of Highland Park and asks writ of mandamus to compel respondent, former treasurer to deliver books, papers and moneys in his hands to the relator. *Held*, that respondent was not entitled to retain the office under Sec. 8, Act. 214, of the Local Acts of 1891, as the duties of treasurer under the section could as well be performed by the relator as by the respondent, and the latter was therefore neither expressly nor impliedly held in office. But that the respondent having acted in good faith, he is entitled to retain out of the money in his hands sufficient to defray the expense incurred by him in the litigation.

SCHWARTZ, Relator, v. BARRY, Police Judge.—Decided Feb. 10.—(Per Curiam.)

Mandamus—Investigation of Affairs of Police Judge—Right of City Controller to Files and Papers.—A duly appointed committee of the Common Council were investigating the affairs of the Police Judge to ascertain fees received by him and not accounted for. The papers and files of the court were in the hands of the city controller, and were being used by the committee in their investigation. The judge made an order requiring the files and papers to be returned to him. *Held*, that they were properly in the hands of the controller; that the council had a right to use them in their investigation, and it was not in the power of the police judge to take them into his possession while the investigation was going on. The matter is therefore reviewable on mandamus.

ELLIS, Attorney General v. DABALL, Circuit Judge.—Decided Feb. 10.—(Per Curiam.)

Habeas Corpus—Indeterminate Sentence—Right to Review Judgment in Habeas Corpus Proceedings.—One John Wilson was sentenced to the state's prison for a period "not exceeding five years." Application was made for writ of Habeas Corpus and granted, and an order issued discharging the prisoner. Attorney General applies for writ of error to vacate this order. *Held*, that the judgment of the Circuit Judge upon an application for Habeas Corpus can not be reviewed on appeal or by writ of error. (People v. Calhoun Circuit Judge, 30 Mich., 285; People v. Conant, 59 Mich., 565; People v. Fairman, 59 Mich., 568; People v. Russell, 46 Barb., 27; People v. Edwards, 66 Ill., 59; High's Ex. Legal Rem., §§ 155, 156.) The sentence was an indeterminate sentence and void, and the Circuit Judge, therefore, had full jurisdiction to entertain the writ of Habeas Corpus.

NUGENT v. ERB, Supervisor.—Decided Feb. 11.—(Per Curiam.)

Mandamus—Assessment of Drain Tax—Irregularity in Proceedings.—Relator, county drain commissioner, asks a mandamus to compel respondent to assess a drain tax. Supervisor refuses to assess the tax on account of certain defects in the proceedings to lay out the drain. *Held*, that the commissioner is required by statute, in determining the necessity to take the land for the purposes of the drain, to take the width, depth, length and commencement of the proposed drain, and the termination thereof, and in case a jury is demanded, to issue a venire describing the property to be taken. That an omission to comply with these provisions makes the proceedings defective to such an extent that no legal drain could be laid out, and the supervisor was not in the wrong in refusing to assess the tax. (Cited: Kroop v. Forman, 81 Mich., 144; Milton v. Drain Commissioner, 40 Mich., 229.)

GOULD v. DWELLING HOUSE INS. CO.—Decided Feb. 12.—(Long, J.)

Insurance Policy—Failure of insured to comply with Provisions—Right of Company to Limit Powers of Agent.—Action to recover for loss on a policy of insurance. *Held*, that the insured is governed by all reasonable provisions and clauses in the policy. Where there is a limitation in the policy upon the time within which suit must be brought, and there is a further clause in the policy, providing that no action shall be sustained in any court unless the insured shall have fully complied with all the requirements, the failure to furnish the proofs within the

time required operates as a forfeiture to plaintiff's right to bring or maintain a suit upon the policy. (*Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y., 162; *Savage v. Howard Ins. Co.*, 52 N. Y., 502; *Underwood v. Farmer's Ins. Co.*, 57 N. Y., 500.) An insurance company has the right to limit the power of its agent, and such limitations if expressly stated in the policy and known to the insured will be binding upon the latter. (*Cleaver v. Ins. Co.*, 65 Mich., 527.)

WILLIAMS v. CLINK.—*Decided Feb. 13.*—(Morse, Ch. J.)

Replevin—Chattel Mortgage—Conveyances to Defraud Creditors or Without Consideration.—Plaintiff brought replevin for certain law books and furniture, under a chattel mortgage which he claimed to hold against the property. Defendant claimed that the mortgage was given without consideration. *Held*, that the law will not aid either party to a conveyance to defraud creditors or without consideration, but leave them where they put themselves, without relief. If the contract is executory it will not be enforced, and if executed it will not be relieved against. If it has been performed in part the law gives it effect in so far as executed, and holds it void, in so far as it remains unexecuted. (*Quirk v. Manning*, 6 Mich., 77; *Judge v. Vogel*, 38 Mich., 569.)

WILLIAMS v. KEYES.—*Decided Feb. 12.*—(Morse, Ch. J.)

Bill for Foreclosure—Negotiable Instruments—*Prima Facie* Rights of Holders.—Complainant files bill to foreclose mortgage given by defendant to one Luce, and assigned by the latter to complainant. *Held*, that one to whom a negotiable instrument is transferred before due, and for a valuable consideration, takes it free from all equities of which he had no notice; and any payment made to the mortgagee's executor, or arrangement between him and defendant, after the note and mortgage were transferred to the complainant could not affect the latter's rights in the premises. (*Reeves v. Scully*, Walk. Chan., 248; *Dutton v. Ives*, 5 Mich. 515; *Helmer v. Krolik*, 36 Mich., 371; *Judge v. Vogel*, 38 Mich., 568.) In case of negotiable securities the holder alone is the one *prima facie* entitled to receive payment. (3 Daniels on Negotiable Instruments, § 1233.)

WINEMAN v. GRUMMOND.—*Decided Feb. 12.*—(Long, J.)

Ejectment—Deeds in Evidence—Testimony as Surveyor—Right to Prove Adverse Possession in Rebuttal.—Action of ejectment brought in Wayne Circuit Court, where plaintiff had verdict and judgment. Defendant brings error and claims that there was error in admitting certain deeds in evidence; that the testimony of the surveyor was improperly admitted; that the judge's charge was erroneous, and that evidence of adverse testimony was wrongfully admitted. *Held*, that deeds held by both plaintiff and defendant are admissible in evidence in determining the ownership of disputed territory. The testimony of old surveyor is also admissible in determining boundary lines. He can state the manner by which he arrives at his conclusions, and can call to his aid maps and plats which he had found correct. (Cited, *Stewart v. Carlton*, 31 Mich., 273.) Boundaries may also in some cases be proved by hearing evidence. (Cited, *Boardman v. Reid*, 6 Peters, 341; *Com. v. Penn.*, C. C. Reports, 496; *Cherry v. Boyd*, 6 Litt. (Ky.), 7.) Charge of the judge in court below that if the jury found that the parcel claimed by plaintiff lies within the boundaries of the plaintiff's property as defined by his deed, then the plaintiff entitled, unless the defendant has acquired the premises by adverse possession, held to be a good charge. The plaintiff may put in further testimony after the defendant rested, showing continuous possession for more than fifteen years; such testimony is proper rebutting evidence.

TURNER, Relator v. SMITH, Under-Sheriff.—*Decided Feb. 16.*—(Per Curiam.)

Mandamus—Contempt of Court—Alternative Sentence—Enforcement of Void Sentence.—Mandamus asked to compel respondent to serve a warrant of commitment, commanding him to receive into his custody and imprison one Marr who had been sentenced, for contempt of court to pay a fine of \$25 within one hour and in default of the payment within the time specified to be imprisoned in the county jail for five days. The sentence of imprisonment was not imposed as a means of ensuring the payment of the fine under the statute, but was a sentence by which the prisoner was subjected to an imprisonment absolutely for five days from which he could, by the terms of the sentence, relieve himself by the payment of the fine within one hour. *Held*, that this was an alternative sentence and therefore void. (*Brownbridge v. People*, 38 Mich., 751; *Donally v. People*, 38 Mich., 756.) As the sentence was void mandamus will not issue to enforce its execution.

BOOK REVIEWS.

VERMONT.—American Commonwealths' Series. By Rowland E. Robinson. Boston: Houghton, Mifflin & Company.

Every citizen, and especially the lawyer, should have a complete knowledge of the history of his own native state, and should possess a general information concerning the principal events in the histories of the other states of the Union. In the American Commonwealths' Series, a very comprehensive and entertaining history of the State of Michigan has been written by Judge Thomas M. Cooley which has become familiar to every patriotic resident of the state. In this same series is the history of Vermont, just issued. When the student has mastered the history of the Green Mountain State, he has become familiar with a considerable portion of the early history of the United States. The conflicts at Ticonderaga, Lake Champlain and Bennington are minutely and accurately described, and the events surrounding the entrance of Vermont into the Union are treated in a thorough and comprehensive manner.

R. S.

MARK HOPKINS.—A Biography by Franklin Carter, President of Williams College. American Religious Leaders' Series. Boston: Houghton, Mifflin & Company.

This book is the sixth of a series which includes biographies of eminent men who represent the theology and methods of the various religious denominations of America. The ones preceding this are Jonathan Edwards, Dr. Muhlenberg, Wilbur Fisk, Francis Wayland and Charles G. Finney. This series is the latest of the valuable series which these enterprising publishers are issuing, the others being American Commonwealth, American Statesmen, and American Men of Letters. The life of Mark Hopkins, who died June 17, 1887, is chiefly interesting to college students because of his long career as president of Williams College, one of the old and substantial educational institutions of New England. He entered Williams as a student in 1821, was a tutor from 1825 until 1827, professor of moral philosophy and rhetoric from 1830 until 1836, when he was elected president of the college and served until his death, in 1887, a period of fifty-one years. To those who intend to make teaching their life work, his life, as placed before us by President Carter, is full of valuable suggestions. President Hopkins was one of the most forceful and eloquent of the ministers of the Congregational faith. He was president of the American Board of Commissioners for Foreign Missions. The biography says, p. 274, "The fifty-five votes that were cast for President Angell, of the Michigan University, as the successor to Dr. Hopkins, were votes rep-

resenting largely the educated brain and tender heart of New England." In 1852, Dr. Hopkins was urged to accept a nomination to the presidency of the University of Michigan.

R. S.

THE STUDY OF CASES.—By Prof. Eugene Wambaugh, of the Law Department of the State University of Iowa. Boston: Little, Brown & Co. 1892.

This new and unique work came from the press only a few days ago. In a neatly bound volume of 360 pages, Professor Wambaugh gives an interesting course of instruction in reading and stating reported cases, composing head-notes and briefs, criticising and comparing authorities, compiling digests, etc. This is a branch of the law upon which the student has had little if any instruction, but which is nevertheless an important branch of legal study. It is quite obvious that a great advantage is to be gained by knowing exactly *how* to study a case. How to get at the gist of a decision; how to apply the principle deduced to other cases, how to determine the weight of a decision, and how to criticise, combine and compare cases are all important considerations which this work systematically treats. The practical value of the work is greatly enhanced by the addition of a choice selection of cases on torts, and on contracts, for study. The book may be very profitably read by the busy lawyer, but is especially valuable to the student.

H. D. J.

ABRIDGMENT OF ELEMENTARY LAW.—By M. E. Dunlap, Counsellor at Law. St. Louis: The F. H. Thomas Law Book Company.

This small and durable volume embodies the general principles, rules, and definitions of law, together with the common maxims and rules of equity jurisprudence, as stated in the standard commentaries of the leading English and American authors. It thus covers the subject contained in the curriculum of most law schools. One of the advantages of studying law in a college, over the office method, is the systematic order in which subjects are presented; but even here the student is plunged into what at first seems to him a hopeless confusion of cases, without any harmonizing principle pervading them. If before the subject were taken up in detail, the student could have presented to his mind the entire scope of the subject, in a clear, systematic manner, or if during his course he could have a handy work of reference which would satisfy the above conditions, then when the broad general principles were applied to the varied contingencies of life, the decision would be seen to fall into its natural and appropriate place, and the spirit of the law would be felt. Mr. Dunlap has just issued a book which contains all the principles of elementary law so arranged as: (1) to facilitate the work of students, and (2) by furnishing a means of quick and accurate reviews, to lighten the burdens of an overworked profession.

E. R. S.

DIRECTORY OF SOCIETIES AND CLUB COURTS.

WEBSTER SOCIETY.

Wednesday evening at 7:30 in the Webster Hall.
President, S. T. Mears,
Vice-President, A. I. Loeb,
Secretary, U. F. Bickley,
Treasurer, W. A. Turner,
Marshal, J. H. Adams.

JEFFERSONIAN SOCIETY.

Thursday evening at 7:30 in the Jeffersonian Hall.
President, G. A. Jeffers,
Vice-President, F. L. Welsheimer,
Corresponding Secretary, D. W. Yancey,
Recording Secretary, H. L. Baker,
Treasurer, D. Lockton,
Marshal, R. A. Hall,
Critic, E. A. Sutherland.

DOUGLASS DEBATING SOCIETY.

Saturday at 4 P. M. in the Quiz Room.
New President and Secretary elected each meeting.
Treasurer, Wm. Davis.

COSMOPOLITAN DEBATING CLUB.

Saturday afternoon at 3 o'clock in the Quiz Room.
Succession of officers each week.

BENTON DEBATING CLUB.

Thursday afternoon immediately after lecture, in Room 10.

President, P. V. Fennelly,
Vice-President, B. F. Scanlon,
Secretary, E. B. Goss,
Treasurer, J. J. Danhof,
Marshal, C. Cook.

BREWSTER DEBATING CLUB.

Each Friday, after Junior lecture, in the Quiz Room.

President, A. W. Jefferis,
Vice-President, R. F. Scanlon,
Secretary, H. L. Williams.

CLAY DEBATING CLUB.

Saturday afternoon at 4 o'clock in Prof. Griffin's Room.

President, Howard J. Slagle,
Vice-President, Lyman G. Grundy,
Secretary and Treasurer, Miles W. Newby.

ARROTT DEBATING SOCIETY.

Saturday afternoon at 1:30 in Prof. Griffin's Room.
President, R. V. Newton,
Vice-President, C. B. McNay,
Secretary, T. W. Slick.

KNOWLTON CLUB.

(In nature, law and social) meets at rooms of members every Friday evening.
President, F. A. Sheldon,
Secretary and Treasury, Geo. M. Davis.

POST GRADUATE CLUB COURT.

Tuesday evening at 7:30 in the Quiz Room.
Chief Justice, T. W. Hughes,
Assistant Justice, W. H. Sears,
Clerk, P. J. Cosgrave,
Sheriff, M. Roach.

COOLEY CLUB COURT.

Friday at 2 P. M. in Room 10.
Judge, N. R. Walsh,
Assistant Judge, A. W. Gravelle,
Secretary, G. A. Sutherland,
Sheriff, D. Weber,
Prosecuting Attorney, T. H. Fox.

GRIFFIN CLUB COURT.

Friday afternoon at 3 o'clock in Prof. Griffin's Room.

Chief Justice, I. L. Jones,
Associate Justice, F. L. Grant,
Clerk, O. W. Moyle,
Sheriff, Albert Martin.

ILLINOIS CLUB COURT.

Saturday at 9 A. M. in Quiz Room.
Chief Justice, H. Slagle,
Associate Justice, H. B. Smith,
Clerk, S. A. Niebuhr,
Sheriff, L. J. Carlock.

INDIANA CLUB COURT.

Monday evening at 7 o'clock in Room 10.
Supreme Judge, D. E. Storms,
Circuit Judge, E. D. Brothers,
Clerk, A. Y. Scott,
Sheriff, Wm. Tichnor.

IOWA CLUB COURT.

Friday evening at 7:30 in Room 10.
Chief Justice, A. McLaughlin,
Assistant Justice, E. H. Bither,
Clerk, O. W. Garrett,
Sheriff, A. D. McCarty.

KANSAS CLUB COURT.

Thursday evening at 7:30 in Room 10.
Judge, E. P. Hotchkiss,
Clerk, Otis E. Hungate,
Sheriff, J. M. Lamer.

MICHIGAN CLUB COURT.

Monday evening at 7:30 in the Quiz Room.
Chief Justice, J. G. Erditz,
Associate Justice, V. D. Sprague,
Clerk, C. F. Rittenger,
Sheriff, D. McDonald,
Prosecuting Attorney, O. B. Van Horn.

MISSOURI CLUB COURT.

Monday evening at 7:30 in Prof. Griffin's Room.
Chief Justice, T. C. Morrin,
Clerk, S. McRoberts,
Sheriff, G. V. Berry.

NEW YORK CLUB COURT.

Wednesday evening at 7:30 in Room 10.
Judge, J. A. VanArsdale,
Clerk, C. W. Eatey,
Sheriff, Wm. M. Findell,
Crier, A. E. Sanderson.

OHIO CLUB COURT.

Thursday evening at 7:30 in the Quiz Room.
Chief Justice, W. E. Young,
First Associate, C. K. Friedman,
Second Associate, O. I. Stauffer,
Clerk, B. F. Brough,
Sheriff, G. W. Belknap,
Deputy Sheriff, O. E. Chadmon.

PACIFIC COAST CLUB COURT.

Saturday at 10 A. M. in Room 10.
Chief Justice, J. E. Roberts,
Assistant Justice, A. I. Loeb,
Clerk, C. M. Dial,
Sheriff, O. B. Morris.

PENNSYLVANIA CLUB COURT.

Tuesday evening at 7:30 in Room 10.
Chief Justice, B. F. Clough,
Associate Justice, Thos. Lawry,
Clerk, H. L. Hegan,
Prosecuting Attorney, O. E. Oliver,
Sheriff, J. W. Browning.

SOUTHERN CLUB COURT.

Chief Justice, D. W. Yancey,
Associate Justice, W. A. Turner,
Clerk, Albert Martin,
Sheriff, H. J. Slagle.

WELLS CLUB COURT.

Friday at 4 P. M. in Prof. Griffin's Room.
Judge, T. A. Morrin,
Clerk, A. F. Wentworth.

TRANS-MISSISSIPPI CLUB COURT.

Friday night at 7:30 in the Quiz Room.
Chief Justice, T. A. Morrin,
Associate Justice, Peter Sharpe,
Clerk, J. F. Webb,
Sheriff, C. P. Dunbaugh.

SUPREME COURT U. OF M.

Meets semi-monthly.
Chief Justice, J. W. Browning,
Associate Justices, James Harrington, Peter Sharpe, W. S. Steele, D. E. Storms, A. F. Wentworth.

MICHIGAN LAW JOURNAL.

VOL. I.

APRIL, 1892.

No. 3.

SOVEREIGNTY IN THE UNITED STATES.*

HON. THOMAS M. COOLEY.

In speaking heretofore on the subject of rights I thought it well to make some reference to the origin of rights; to show how they spring up, and how some that are considered fundamental in their nature generally or, perhaps, even at once became incorporated into what is called a Constitution, whether embodied in written form or existing merely in the customs of the people; I referred also to the fact that every people had its theory of government, and that this theory went far to qualify the rights of the people; that rights were construed with reference to it, and in a measure modified by it, and that they might be different in one country from what they were in another, though known by the same name. I remarked upon the fact that changes were likely to follow in fundamental rights and in the terms that were made use of under different governments, without necessarily any change of words, so that the same word implied a different thing in one age, perhaps, from what it did in another, as well as in one country from what it did in others. For example, William the Conqueror was called sovereign, and so is Victoria called sovereign, although William had nearly absolute power and Victoria has little more than nominal power; and now by the existing theory of government, which has come silently into recognition, the sovereign authority is in the Parliament of the country, which is supposed to be capable of making laws that no one can resist or refuse to obey. I spoke of our own National Government as being that of a sovereignty formed by the people of thirteen others—thirteen sovereign states who assigned to it certain complete or sovereign powers in respect to which it was not to be subject in any degree to them, and doing this by a Constitution in written form which in express terms reserved to those thirteen and to the people the powers which had not in terms or by necessary implication been conferred upon the general Government. In mentioning this, I, of course, only gave the theory as it was understood in this country; the theory which I find thus expressed by Judge Hare as the result of authoritative decisions: "It

* A lecture delivered in a course on "Rights" to a class of post-graduates. Somewhat expanded as here given.

was at length, [in the Constitutional Convention] after much anxious deliberation, perceived that a national government might be established which, acting not upon or through the states, but directly on the citizen, would be supreme through the whole range of its powers, but yet, being confined within fixed limits, would not divest the jurisdiction of the states over the matters committed to their care. State sovereignty would remain, although curtailed in its proportions; and out of what states surrendered, a new government would be formed, not only sovereign, but for all the purposes of existence, paramount. The power of regulation and adjustment would devolve on the judiciary of the United States, which would act as a balance-wheel of the Constitution, keeping the National Government and the states to their respective orbits; and as it would belong to the Supreme Court to declare the law, so it would be the duty of the president to enforce it with the whole power of the government. But the states would retain a legislative power, embracing the ordinary concerns of life and trade, and absolute within its peculiar sphere. Their sovereignty, like that of the United States, would be derived immediately from the people, and they would be responsible to their constituents and not to the General Government, for the manner in which it was exercised. Each man, each rod of ground, every navigable stream, would, agreeably to this scheme, have two masters, both entitled to command and to enforce their orders by appropriate penalties, but with powers so nicely harmonized and adjusted that neither could in the ordinary course of events be brought into conflict with the other." (*) This is the theory deduced from Federal decisions, and upon which the legislative and executive authorities have administered the government.

It was soon found, however, that there were parties inclined to take a different view of the federal system to that above expressed. The Kentucky and Virginia resolutions of 1798 and 1799, growing out of a distrust, on the part of the Republican party of the day, of the purposes of the Federalists, were thought by many difficult to reconcile with the idea of self-perpetuating national powers, though Mr. Jefferson, with whom they originated, defended them. The New England Federalists soon retorted upon Jefferson, by claiming the right to nullify his embargo measures through the exercise of state powers. The history of that crisis,—for it was really a serious crisis,—is well given in the History of New England Federalism, by Mr. Henry Adams. I leave it with merely this reference.

The nullification episode during the administration of President Jackson was even more serious than this. The claim of a right to nullify federal laws, based upon the sovereign rights of the states, as it was expounded by Mr. Calhoun made the Federal Government little more than an agency of the states, and was one that threatened to call for the exercise of armed force to maintain national supremacy in respect to national affairs; but it was got along with, for a time, by the compromise

* Hare's American Constitutional Law, pp. 22-23. See also pp. 23-27.

legislation brought forward by Mr. Olay. This did not settle the question in controversy, however, for those who had followed Mr. Calhoun continued to insist upon the correctness of the positions taken by him until the great civil war was over, and some of them afterwards.

The theory of state sovereignty was pushed to the extreme when the doctrine of secession was attempted to be put into force by the withdrawal of dissatisfied states from the union. It required four years of bloody war and an immense expenditure of treasure to put the claim of right then advanced absolutely at rest. And I think I may add that it was then believed that the American theory, as it has been presented above, was from that time forward to be received and acted upon as forever settled.

Recently, however, a disposition to depart from this theory has shown itself on another side. Instead of state sovereignty being pushed to the extreme that would destroy the union which had been agreed upon, it is now national sovereignty which it is said is inconsistent with the existence of any state sovereignty whatever. This last claim is supposed to represent the best modern thought, but it is only a new phase of the doctrine, that sovereignty is indivisible, which was at the bottom of nullification and secession, though then it presented its face to the states while now it turns its back upon them. Those advancing it say that Mr. Calhoun, from the facts as he stated them, namely, that in the formation of the Constitution sovereign powers were retained by the states, proved clearly the doctrine of the rightful nullification of national powers. This I think a great mistake. Certainly the American statesmen were not convinced, nor were the American jurists, nor American historians, nor the American people, except those who desired to be convinced that they might follow him into nullification and secession. For while the people and those who authoritatively spoke for them did not in general question that sovereign powers were reserved to the states, they would have done in 1832 what was in fact done a generation later—taxed to the utmost their war resources, if necessary, in resistance to his conclusions, which to them seemed wholly untenable and baseless. And an apologist for the late secession may well say that if in forming a national union with certain sovereign powers the reservation of others to the states was impossible, then the right of secession must be unquestionable; for this was precisely what was attempted, and if it was impossible of accomplishment, then our National Government has never been legitimately formed at all, and the separate states must be at liberty to march out at will. But if in point of fact a union was formed which is itself sovereign, and which absorbed all the sovereignty of the states, then it is a union which the states never agreed to form, and never would have formed, but would have resisted to the last; and therefore, their right to secede from it must, on moral grounds at least, be unquestionable. They cannot with justice be held to a consolidated union when they did not understand they were forming one,

and never did and never would have yielded their assent to one. But we have no interest in suggesting a justification for secession, as the doctrine in question appears to do.

The difficulty of understanding and accepting the theory, as stated by Judge Hare, seems to come from the fact that sovereignty is by its definition the supreme and irresistible will of a state, and cannot be otherwise than entire and indivisible within its territorial limits. The facts of history in the case of any state it is supposed must be read in the light of this fundamental fact, and their interpretation must conform to the definition. No exception is to be admissible, but the application must be made in every case, whether the sovereign state be an absolute despotism or a federal republic which its founders have endeavored to make altogether unique.

Now this seems to be making the definition the master where it should properly be the mere servant. It subordinates facts to the terms in which they are to be described, and it sets limits by iron rules for no other apparent reason than that the rules are in existence, and whatever happens must therefore conform to them. But coming to the particular subject we have in hand, I think I may say with abundant authority to support me, that an event in history so great and striking as was the formation of the federal constitution—the greatest event of the age as the consequences flowing from it demonstrated—is quite beyond being distorted in meaning or dwarfed in significance or converted into something different from what the actors in it intended, by any such assumption as that it must in definition come into conformity with other facts whose history is different, or that the work which the actors accomplished must be measured by standards to which they made no reference whatever, and which it is plain it was their purpose to avoid. The great interests involved cannot be made to depend upon the meaning of terms which for metaphysical or academic reasons those who come after them may think proper to apply, especially when the application is plainly antagonistic to the intent. If what was done was meant to be and was really unique, so that any word or words in use do not accurately define it, it is entitled to have and demand a definition that will fit it, though it will fit no other, and for the very reason that it will fit no other: it is entitled to stand out by itself, distinct from all that in substance is found to be different. Nations are not limited in their powers by any supposed deficiency in language to accurately describe their acts, but commentators must take facts as they are, and find words which, in description, shall place them before the world accurately.

But let us examine a little this term sovereignty. Possibly applying it to the American states and their union also, which modern thought is supposed to find absolutely impossible, may not be so difficult as it is claimed to be. Sovereignty is spoken of not infrequently as if it were some specific thing, the peculiar characteristic of every independent state

and the same everywhere; the supreme will of the people of that state; the irresistible force, or, as Vice-President Stephens in his defense of Secession after the war was over described it, the paramount authority.* Any one of these definitions is sufficient for our purpose, but if we take either and undertake to apply it in the strict sense of the words, we may be compelled to inquire at the outset whether any such thing exists on the face of the globe at this time, unless perhaps we are to find it in the country of some barbarous chief who may order men up for instant execution without cause, or direct a man's wife to be taken from him and delivered to another at pleasure, or feed children to wild beasts. Such a chief, if possessing undisputed authority within his dominions, might well be spoken of as a sovereign possessing and exercising at pleasure the supreme will; but outside of such dominions if we look among civilized or even barbarous people we shall find such supreme authority as exists in any state is invariably to some extent qualified, and generally to a very considerable extent; that there are many powers within the compass of the supreme will, which arbitrary rulers exercise, that are not understood to be powers which can be exercised by any organ of the state under the existing government, or under any other that could rightfully be formed. We find also that in every country the sovereignty as it actually exists is somewhat different from what it is in any other; that somethings may be done in one which in any other are considered as outside the province of any governmental force whatever. A man in Morocco might perhaps be tried for supposed crimes secretly and without opportunity to make defense, but this would not be within the compass of sovereignty in France. From Russia a man might be banished to unknown regions by the arbitrary exercises of power, but not from Italy. In Great Britain a state church might be maintained, but not in the United States or in any one of the forty-four states composing the union.

This inability of what is called sovereign power to perform the acts indicated is not merely temporary, and does not depend upon the existing form of government; it is something that springs from the thoughts and purposes of the people, and qualifies sovereignty because the people do not understand the supreme will of the state to extend to such powers. We may say that in England, at this time, the Parliament has the sovereign power; that it may enact any laws it pleases; but if Parliament were to enact a law that was destructive in any respect to the fundamental rights of Englishmen as understood and accepted since the time of Magna Charta, the law would utterly fail of effect, either because the people and the authorities treated it with contempt, as unauthorized and beyond the proper compass of sovereignty, or because they would successfully rebel against any attempt to put it in force, even to the extent of revolution should that be necessary. This, I take it was what Lord Coke meant

*War between the States, Vol. 2, p. 22.

should be understood when he said, on the suggestion being made that the Petition of Right should be accepted with a reservation of the rights of the sovereign, "Magna Charta is such a fellow that he will have no sovereign:" Magna Charta, as here used, being a synonym for The Fundamental Rights of Englishmen. Moreover, sovereignty is not only different in every country, but it is continually changing; a process of exclusion is going on which takes some subjects from its sphere, and to some extent also a process of addition which brings in some subjects which it has come to be thought may properly fall within the compass of government, although formerly it was supposed they were outside its province. We speak sometimes of a paternal government, and the contrary, but we understand at once that the definition takes us back of the organized government to the ideas prevailing among the people, which in one country admit of many things that in another would be held to belong, not by permission of sovereign power merely, but of right, to families or to communities, and should not be dealt with at all by any public authority except by way of protection; in other words, they are not within the proper compass of the governmental authority of the state. I refer you in this connection to what is said by Mr. Edward Everett, scholar and statesman and eminent in both capacities, on this peculiar feature of the differences in what is understood by sovereignty in different countries.*

It may well be said, however, that sovereignty implies only the supreme will of the state, as interpreted and measured by the Constitution, the customs and prevailing opinions of the people, which limit it, and therefore the definition is well enough notwithstanding the differences that are to be found in different countries. Admitting this, I think we may then say that if we are to understand sovereignty to extend to all matters of government in the state, and to embrace whatever authority the people of the state as individuals or as a political body are expected to obey, and that no higher will or higher law can exist as to any of these, then there is not to-day and there has never been any such thing as one sole and supreme will in any country in Christendom; because always and everywhere there has been a code of laws which were above the sovereignty itself as to the matters coming within their provisions, and which every state was expected and bound to obey. I refer now to the laws of nations, which are supposed to be created by the sovereignties themselves, and to which all must pay obedience. These relate to some of the higher powers of government; and although it is quite true that any sovereign may break through them or refuse to obey any single one of them, it is not true that this may be done rightfully. Germany, for example, in the great war of 1870 might have butchered all the French prisoners, but if it had done so it would have been recognized by the whole world as a great criminal, which might rightfully, and which ought to be punished for its barbarous

*4 Everett's Orations and Speeches, 362-3.

conduct. It may be that it would have been impossible to inflict the punishment, but this would not affect the fact that this sovereignty had violated a great law which was obligatory upon it. It often happens in private life that a man's right fails to be enforced because of the difficulty of an adequate remedy, or because officers do not do their duty, but the wrong may be just as patent notwithstanding; the sanction which the sovereignty ought to give to the right may have failed of application, but this does not affect the rule of law; and just as little would the theory of the law of nations that all sovereignties are subordinate to it be affected by the failure in any particular instance to enforce any one of its provisions. The code itself cannot be changed by a single sovereignty at will. Nor is there any difficulty in the code being enlarged by positive agreement, as it has been heretofore by implied agreement, nor in two or more nations uniting by agreement to add to its provisions so far as relates to their own interests, as has sometimes been done by important treaties which were intended as permanent limitations upon sovereignty. The neutralization of the Low Countries may be taken as an instance.

But, if all sovereignties may thus be subject to a code of laws which they are understood to have by their own will created, and which they cannot rightfully depart from or alter without general concurrence, what is the difficulty when there are thirteen in a union of all under a constitution which shall create a common government, with certain specified but supreme powers, while retaining to themselves other powers undiminished and unimpaired? Possibly it may be argued that such an agreement if made by states would be only a treaty; and as a treaty must always be a treaty, it could not be a constitution. But a people is not restricted by mere technical rules in the framing of institutions. Suppose that thirteen sovereignties merge into one by a treaty which specifies the conditions; does this not thus become the fundamental law of that one? We shall probably find that from time to time such things will take place hereafter. And surely the supreme will or irresistible force of states is not so hampered by the chains of definition as to prevent. And if sovereignties can thus merge altogether, surely there can be no fatal impediment to their forming a single sovereignty as to certain powers, by an instrument of whatever name, which they agree shall be the fundamental law. To call states thus hampered, sovereignties, in the sense that makes sovereignty expressive of the supreme will or paramount authority, seems a contradiction in terms. It is very certain, I think, that great statesmen, when the crisis shall present itself that seems to call for some such action in the interests of their states respectively, will pay little attention to any mere definition which is interposed as an obstacle. They will expect a proper and fitting definition to come in due time.

In the light of what has been said, is it not manifest that sovereignty consists rather in an aggregate of powers, each more or less complete in itself, which it is understood in the country where the term is used are

proper governmental powers, and does not include others which it is agreed government in that country has no right to exercise? And in this understanding of the term where is the insurmountable difficulty in a people, with state organization and exercising sovereign powers, entering into binding and perpetual arrangements, by whatsoever name called, with other like states whereby a portion of these powers shall be granted to a new state which is created by all uniting for their common good, while other powers are preserved unimpaired? It is certainly not one of a practical nature, for this is what was done in founding the Federal constitution, if we judge by the intent, and the government has been successfully administered under it in accordance with the intent ever since, and without serious friction except when treasonable hands have assailed it.

It may be said that this is a mere matter of definition. The people of the United States saw fit to create state and National Governments as two organs through which to give effect to the one sovereign will, which was in them as an aggregate. It is not denied that the several governments are to exercise their respective powers without restraint or interruption except as provided for, but they do this because the supreme will resting in the people of all the states as one people has so determined. This is reasoning which springs from the necessity of finding the one indivisible supreme will somewhere, and it disregards or treats as of no moment the fact that the people as an aggregate had no agency in creating the thirteen original states, did not act together as such in any of the steps preceding the adoption of the Constitution, or in the adoption, and that the Constitution contemplates they never will act together as such. And it makes the reservations to the states something less than sovereign powers, although they were understood to be such before. I must insist that this is making the definition of a term not found in the Constitution, and itself, as employed, of variable meaning, have greater force in construing facts than the facts themselves.

I shall now refer you to what has been said by two persons entitled to speak with some authority respecting the establishment of the Federal Constitution, and what is its true theory; Madison, who was one of the makers, and who assisted in expounding it to the people when it was before them for adoption, and who afterwards administered it as president, and Webster, who by reason of his great expositions in public speeches has been called in this country and others, "The Great Expounder." I regret that I am unable for want of time to read the words of these great men, but I refer you here to their works, where you will find what they say upon this subject.* I name these two in part because they belong to two distinct and different schools of politics in this country, and together may be said to express views prevailing in both. You will find what is said not to be out of harmony with what is stated by Judge Hare, as quoted above, so far as relates to the question now immediately in hand. I call your attention also to what is said by Mr. George Bancroft,

who made American history the study of a lifetime, both in private life and in high official stations. His history of the Constitution of the United States was the careful work of his mature years, and the world may be searched in vain for one better entitled to give respecting it an expression of the best modern thought.† His theory of the Constitution has the prime merit that it is based upon the facts of history, and does not depend at all upon the sort of philosophical mysticism, which forms a general theory first and then undertakes the impossible task of making the diverse systems of different nations conform to it. Certainly Mr. Bancroft is far better entitled to be considered a correct expositor of the Constitution than is any one who comes to its examination with a general theory of government and general definitions, which it is supposed are of universal application, and simply addresses himself to the task of forcing our peculiar system of government to accommodate itself to the theory and to assume the dress of the definitions. And the guidance of those who assisted in the making or in the administration of the Constitution is far safer than that of those who, reasoning from the general doctrines they lay down, and treating as of little or no importance the peculiarities of the particular subject under consideration, tell us about the impossibility of such a thing existing as two sovereignties within the same territorial limits. The obvious answer is to them is, that they do exist, and have existed, working out great and beneficent results for a century. When the thirteen states severally assented to the national Constitution it was agreed without dissent that up to that time they were severally sovereign states; a large proportion of their powers were reserved to the states as a sphere of action into which the national authority could not enter, while other specified powers were granted to the United States. The powers were sovereign, but of course the term is to be understood with proper regard to the facts. Whoever denies the possibility of a division of sovereign powers by any other than a geographical line denies the necessary conclusions deduced from the action of the constituted authorities of the country, judicial, legislative, and executive, and antagonizes the leading historical writers and commentators, who have kept to the facts and endeavored to present them in their true features. It must be obvious on very slight reflection that the theory of exclusive national sovereignty will naturally tend to affect the balance of constitutional power as between the nation and the states. How can a supreme, paramount, irresistible will be a usurper?, will naturally be the question in men's minds.

When Mr. Webster made his great speech in vindication of Federal power, the national authority was in great need of being strengthened as against the aggressions of what were claimed to be state rights. But the time had gone by when secession was put down that the fear of aggression

*4 Madison's Writings, p. 61, 329, 390.

5 Webster's Works, p. 389.

† Bancroft's Constitution of the U. S. Book V. Ch., 1.

See also Bryce, American Commonwealth, Vol. 1, Ch. 4 and 36.

upon constitutional authority from that side had plausible foundation. The immense interests now under the control of the Federal Government, the great number of persons in its service, the vast sums of money collected and disbursed by it, have given a tendency in the direction of centralization of powers which needs no special acceleration from any criticism of the judicial or other decisions that have protected the states in the sovereign authority retained by them. The dogma of indivisible sovereignty which, when it last had formidable support in the country, was urged in defense of unfounded claims in the states, will be harmful on the other side precisely in the degree that it finds lodgment in the minds of the people. The very confusion it creates in the public mind regarding the correct theory of our government as authoritatively expounded is of itself a mischief, since it tends to weaken the respect for authority or to mislead the thoughts of men regarding it.

The theory of the Federal Constitution is obvious enough on its face, and no reasoning upon what is implied in the word "sovereignty" is of any weight whatever in opposition to the clear provisions of the Constitution itself. It is idle to tell us that the parties to the American Confederacy were powerless to do what in forming the Constitution they undertook; they did accomplish it by ratifying in their several state conventions a proposed fundamental law which expressed their purposes clearly, and which ever since has been administered according to their understanding. The theory founded upon a supposed meaning of the uncertain term "sovereignty" which they did not even have occasion to make use of in their work, has been authoritatively overruled every time it has made its appearance, for the plain reason that as applied to the United States it is a theory without facts to support it, and antagonistic to the most prominent feature of our political system.*

A short statement of the real case is this: The people in adopting the Constitution declared therein in express terms that it should be the supreme law; and it is the supreme law not more when it grants specified sovereign powers to the nation over some subjects than when it reserves to the states respectively complete powers on other subjects. Its supremacy in either particular cannot be taken away or qualified by abstract reasoning on the general nature of a state, for the terms employed are simple, plain, and clear, being intended for the comprehension of every intelligent citizen. Such a citizen coming to a consideration of the fundamental law will have no difficulty in understanding the co-ordinate existence of the national with the state sovereignty, which it was its purpose to establish on a firm and lasting basis, and which has already been in operation for a century. He will see very clearly with Mr. Bancroft that "the supremacy of the states in the powers which have not been granted is as

* See what is said by Gov. D. H. Chamberlain in Constitutional Hist. U. S. as seen in the Development of American law. p. 217.

essentially a part of the system as the supremacy of the general government in its sphere." *

Mr. Webster, in his great speech in reply to Hayne, says: "That the states are sovereign in many respects, nobody doubts,"† and this expression has peculiar force from the fact that it occurs in a vindication of national sovereignty made more than forty years after the Constitution had been put in force, during all which time it had been administered upon the understanding that Mr. Webster's contention, which admitted of state and national sovereignty within the same territorial limits, was unquestionably the true construction. Mr. George T. Curtis, the author of a history of the Constitution which has long been a standard authority, says: "I never was able to see how the opposite doctrine was consistent with the facts respecting the establishment of the Constitution and its unquestioned language."‡ Well might he say this, for the features of co-existence of sovereign powers in nation and states is not only more prominent in the Constitution and in its daily administration than any other, but it has been more generally praised than any other. It was devised and agreed upon by able men, well versed in political philosophy, and the document which established it was expressed in terms selected with unusual care and painstaking, that it might be understood by the common mind, and at the same time stand, as it has done, the tests of severest criticism. Mr. Curtis says of Mr. Webster's great defense of this unique feature of the Constitution, that it "constitutes the chief glory of his own great fame;" and such we have every reason to believe was Mr. Webster's own opinion. The merit of this great effort consisted in its demonstration that national sovereignty could be vindicated though state sovereignty was undeniable. It is suggested that he should have taken a position directly the opposite of this, and planted himself upon an exclusive sovereignty in the nation. Had he done so, the great glory of which Mr. Curtis speaks, and which is now one of the cherished treasures of the nation, would never have come to him, for his vindication of federal sovereignty, which was regarded at the time as so complete, and which was in fact so effective as almost to close the argument against nullification, would have fallen without effect, or, so far as it had any influence whatever, would have strengthened nullification by assuming to present as its opposite a doctrine still more unfounded and indefensible. Whoever is at all versed in the early history of this country up to the time when this vindication was made, cannot fail to understand that the assent of the people to the doctrine of an exclusive

* Bancroft. Hist. of Const. of U. S., Book 5, Ch. 1. Hamilton in the Federalist, No. 39, speaks of the "Constitutional recognition of the portion of sovereignty remaining in the individual states;" and of their "residuary sovereignty."

† Mr. Webster, in his speech on Foote's resolution, said: "The states are unquestionably sovereign, so far as their sovereignty is not affected by this supreme law." 3 Works, p. 321. They had, when national powers were established, as Justice Story says, "the residuary sovereignty." Story on Const., § 209.

‡ This passage occurs in a review by Mr. Curtis of the work of A. H. Stephens, referred to above. The review is reprinted by Mr. Stephens in Reviewers Reviewed, p. 62.

sovereignty in the Union could never have been obtained at any time, even as a mere theory. The doctrine itself was repulsive and would have been rejected at once, and had Mr. Webster planted himself upon it the great fame which he afterwards attained would in all probability never have reached important proportions. Fortunately for the country and his own glory Mr. Webster had been too close a student of the history of the Constitution, and had far too much practical wisdom, to make so fatal a blunder. He planted himself upon what he knew was the theory which the founders of the government had of the work they had created, and he had no difficulty in vindicating the rights of the states and of the nation respectively in such manner that when he declared unhesitatingly that the sovereignty of the states "in many respects nobody doubts" he had the concurrent sentiment of the country nearly unanimous with him, and his demonstration of the co-existence of national sovereignty and state sovereignty within the same territorial limits suggested to few minds then loyal to the government any difficulty whatever.

We do well to follow Mr. Webster in his employment of terms, not only because he planted himself upon the facts of history, but because he has with him the general concurrence of authority. We have no interest in showing if we could that he based his argument upon a fallacy, because the showing could benefit no one, cure no evil, remove no defect. The old doctrine that sovereignty is indivisible is seen to have reason for its foundation when it is proposed to introduce two or more sovereigns into the same territory with like powers. Then there arises the practical difficulty of a divided allegiance with subjects who are liable to inconsistent demands, and all the difficulties and dangers of a continual conflict of duties. But all this is completely provided against by the Constitution; there can be no conflicting duties arising from federal and state sovereign authority, and the laws enacted can be concurrently enforced with no more possibility of conflict or confusion than when a state and one of its municipalities enforce their respective laws contemporaneously. To refuse to recognize the exception in the definitions and then to base important principles of government upon supposed difficulties which have been effectually provided against, savors more of caviling than of statesmanship. It was admissible in Mr. Vice-President Stephens, who was assailing the constitutional theory, but Mr. Webster was concerned to show, as he so nobly did, that the Constitution was a masterpiece of workmanship, especially in the feature that was then being so vigorously assailed.

In all I have said, I have avoided entering upon any discussion of controverted questions which, however interesting, I regard as of no practical importance. And in making use of the word "State" I mean always not the government for the time being, but the people in whom is the qualified sovereignty which the states possess.

THE "LAW REPORTS."

 PROF. NATHAN ABBOTT.

The period between the years 1860 and 1870 marks an interesting stage in the history of law reporting. Within this period a system of reporting that had existed for upward of three centuries came to an end, and an experiment was begun whereby it was hoped to produce reports not merely in a new way, but reports that were to be materially different in form and substance from those of the previous system. The conception of the enterprise and its successful accomplishment is due to the energy and discretion of one man, whose history of the affair, after twenty years of trial had tested the merits and defects of his scheme, makes one of the most entertaining contributions to legal bibliography.*

Lawyers know the story of the Law Reports: to give an outline of it may not be uninteresting to those who are beginning to consult them.

For twenty years prior to 1860 the question, What improvement may be made in the system of law reporting? was the subject of reports to societies for promoting social science and law amendment, and of articles in the current lay and legal periodicals. The customary panacea, a "motion" in the House of Commons "for the appointment of a select committee to inquire into the expediency of appointing authorized reporters in the courts of law" fortunately was not prescribed. Notice of such a motion was given in 1855, but nothing further was done.

There is no doubt that the system of reporting was unsatisfactory, and the legal profession wanted relief from the evils which grew out of it. But to reform the system was an enterprise which timid men regarded as over-hazardous and the sanguine felt to be full of difficulty.†

It may be helpful to recall the method of reporting that was in use, and some of its defects, and the difficulties in the way of a change.

In the English courts, a judge is not obliged to give a written decision. He may give written decisions. Any barrister may make notes of the oral decisions, and selecting from them and the written decisions those he thinks of value may publish them as his reports, as often and in such form as his industry and ambition may prompt. For two centuries prior to 1785, whether or not a decision should be published, and whether or not it would be accurate, depended on the energy and intelligence of the individual reporter. The growth of commerce, the development of the

* The History and Origin of the Law Reports: W. T. S. Daniel, Q. C., London, William Clowes & Sons, 1884, pp. 359.

† G. W. Hemming, Q. C., The Law Reports, Law Q'tly. Rev., Vol. I, p. 287 (July, 1885).

law, and increase of litigation in the time of Lord Mansfield, occasioned a material increase in decisions, and the need was felt of having them reported more promptly and continuously than was the practice in the early method. To meet this need, in 1785, the publication of the Term Reports was begun *as a commercial enterprise* (Daniel, p. 267.)

In the preface to the first volume of these reports it was announced that they were to be published "within a short time after each term" of court, "the primary object of which is to remedy the inconvenience felt by every part of the profession of waiting two or three years till some gentleman of experience and ability had collected matter sufficient to form a complete volume." With the Term Reports began the system of reporting for profit and not for honor, a system which was maintained with increasing ill results, until put an end to in 1865.

What were the evils of the two systems? It is apparent, from comparing the dates of decisions with the dates of their publication, that the reporters were dilatory. Moreover it is not infrequent to find long lapses of time in which no decision is published, although the reporter may have made his notes, and these notes thereafter might become the best evidence of the law. When one considers the formalities with which the most trifling statute is announced, and the accuracy with which it is engrossed, and with this contrasts the fact that a decision materially affecting the status of life or property may be hidden away to be used or not at the convenience of some reporter, there seems an inconsistency in the method of perpetuating these two great branches of the law. Such a thing is possible but perhaps not probable; it was one of the purposes of the Law Reports to remedy this inconsistency.

To appreciate the state of that evil one might refer to the report of Sergeant Pulling, in 1849, to the Law Amendment Society, more especially to his allusion to "an eminent *Nisi Prius* reporter," who preserved "in MS. a whole pile of decisions of a late Chief Justice which he deemed *bad law*," and to the quotation from the preface of Watkins' Principles of Conveyancing, where Mr. Watkins perhaps after a hard experience, asked, "Is the law of England to depend upon the private notes of an individual, and to which an individual can only have access? Is a judge to say, 'Lo! I have the law of England on this point in my pocket; there is a note of the case which contains an exact statement of the whole facts, and the decisions of my Lord A or my Lord B upon them. He was a great, a very great man; I am bound by his decision; all you have been reading was erroneous. The printed books are inaccurate; I cannot go into principle. The point is settled by this case.' Under such circumstances, who is to know when he is right or when he is wrong? If conclusions from unquestionable principles are to be overthrown in the last stage of a suit by private *memoranda*, who can hope to become acquainted with the laws of England? * * * Is a paper, evidencing the law of England, to be buttoned up in the side pocket of a judge, or to serve for a mouse to sit

upon in the dusty corner of a private library? If the law of England is to be deduced from adjudged cases, let the reports of those cases be *certain, known and authenticated.*" *

To these defects in the reports must be added those occasioned by the undue stimulation of the number of reports by the spirit of commercial enterprise. To explain this a word should be said as to the meaning and signification of the "authorized reporters." Theoretically decisions reported by a barrister could be cited as authorities. Generally only those barristers reported who enjoyed the patronage of the judge of the court where decisions were reported. This patronage might take the form of sole privilege of access to the judge's written decisions, or the advantage of his revision of the reporter's notes of his oral ones. It also might take the form of exclusive privilege of citation in the judge's court. This privilege of citation, originally a necessity, grew into a right which was maintained by authority (Daniel, p. 268). Under this patronage and privilege, reporting became a monopoly with large profits. "The remuneration of the reporters was as high as £40 per sheet of sixteen pages,—a volume of Barnewall and Cresswell was worth £2,000 a year to the reporters" (Daniel, p. 268). It is apparent that the number of pages in a report meant something different to the reporter and publisher from what it did to the reader. A transcript of all the pleadings, a detailed statement of the facts, and arguments of counsel, with insertion in parentheses of comments of the judges, followed by the decision of each judge, presented as cheerful a prospect to the reporter as it was annoying to the lawyer. Under sanction of the privilege of citation, and in harmony with the doctrines of free trade the process went merrily on until in 1866, there were sixteen sets of authorized reports, and, as they could not be published contemporaneously with the decisions, there also were six publications that appeared weekly or monthly. But increase of numbers meant decrease in profits, so that in 1863 it was said, "the persons who report now are remunerated, a few, well—a few more, reasonably well—most of them shabbily—some *not at all* literally (Daniel, p. 49). Two results had attended this competition, the reporter was obliged to pad his reports, and the publisher to raise the price, until it was a burden to buy or read the reports. The cost of the entire series was £50 per year (Daniel, p. 255).

* An instructive illustration of this may be found in the opinion given by Mr. Hargrave in the *Walpole Case* (2 Hargrave's *Juris consult Exercitationes*, p. 70), where he says (p. 100), "In truth, as far as my researches hitherto enable me to assert, no such precedent is to be met with in our printed books. However it so happens that, fortunately for the interests of Lord Walpole, . . . there is in my possession a *manuscript* containing five judgments of the late Lord Camden whilst he was Lord Chancellor, carefully copied from his own handwriting. . . . I consider this case . . . as a precedent of solemn adjudication." (p. 107.) "Nor is it a little remarkable that this judgment of Lord Camden is one of the only five written judgments which his various court books, whilst he was Lord Chancellor, furnish." (p. 108.)

The case in manuscript was *Dufour v. Ferraro*. It had lain in secret for twelve years until Mr. Hargrave resurrected it, and it would be instructive to trace the influence of the decision as produced by him in his *Law Tracts*, vol. 2, p. 100, and in connection with *Orford v. Walpole*, 3 Ves., 126, in England, and *Izzard v. Middleton*, 1 Dessaus, 116, in this country.

It was estimated that the annual cost of such reports as were required by a considerable body of the barristers was £30 (Daniel, p. 12 and 51).

It is apparent that there was occasion for change in the method of law reporting. Acting on this supposition, May 18, 1863, Mr. Daniel prepared and circulated among the bar a paper headed "Suggestions for an Alteration in the Present System of Law Reporting." In this Mr. Daniel said "the evil is felt and admitted, the cause is patent. The stage of inquiry is passed. What is wanted is a remedy" (Daniel, p. 24.) A proposition had been made previously that the chancellor issue a royal commission to inquire into the evils. Mr. Daniel asserted that neither such a commission nor government aid was suitable, but that the remedy was to be looked for and could be found only within the bar itself, and proposed that "the members of the bar now engaged in reporting or such of them as should think proper, together with any other member of the bar who may offer acceptable services or co-operation, should form themselves into a body of associated reporters, and by means of a proper system of division of labor and editorial superintendence, undertake the preparation and publication in *weekly* numbers, at a moderate charge, of the decisions of all the Superior Courts of Law and Equity, including the Probate and Divorce Courts, the Admiralty Courts and the House of Lords and Privy Council." He invited an expression of opinion from the bar to which there was such encouraging response that on the 12th of December, 1863, he addressed a public letter to Sir Roundell Palmer, Solicitor General, "On the Present System of Law Reporting."

In this letter Mr. Daniel narrates at length the history of law reporting with the causes of the defects therein, and gives the details of his scheme of reform. In substance this was that a meeting of the bar be called by the Attorney-General, as the head of the profession, for the purpose of passing resolutions condemnatory of the then existing system. If such resolutions were passed by a well attended meeting supported by the leaders of the bar, Mr. Daniel further said "I should then suggest that the Benchers of the Four Inns of Court be memorialized by the meeting, represented by the president, to concur in the necessary measures for the appointment of a joint committee of the Four Inns . . . to be called the Council of Reporting, and to consist of fifteen members, of whom the Attorney-General, the Solicitor-General, and the Queen's Advocate, for the time being, should be members *ex officio*. The other twelve members to be elected and appointed by the Benchers of each Inn,—for the period of three years, and to be fairly selected from practicing members of each department of the bar, without reference to standing, so as to form a body who, from their position in the profession, would themselves be interested and would also fairly represent the interests of the rest of the profession in establishing and maintaining the constant efficiency of the "Reports . . . I propose that this body should act gratuitously." Provision was made for the appointment of editors and reporters subject to the approval of the

judges of the several courts, and "that the reporters so to be appointed and approved be recognized as officers of the respective courts, have a place assigned to them at the bar, and have access to and possession, for the purpose of reporting, of all copies of pleadings, evidence, papers, and documents connected with cases to be reported, which it is in the power of the court to authorize or afford." Weekly numbers of the reports were to be published for use of the profession and citation until the more complete reports shall have been published, which should be once in three months or oftener. The series to be called "The Bar Reports," and be the only reports citable as authority. The labor of reporting and editing to be directed toward rendering "these reports a work which will not only be a safe guide in the future administration of justice, but also by preventing the accumulation of useless and mischievous matter for the future, help to promote the study of law as a science." Reasons were given tending to show that at an annual cost not to exceed 10£ 10s. subscriptions could be had from the profession sufficient to provide not only for the expenses of printing and salaries of reporters and editors, but for a fund with which to compensate vested interests or to pension superannuated reporters.

Early in November, at the suggestion of Sir Roundell Palmer, who now was Attorney General, a paper requesting him to call a meeting of the bar was circulated among the barristers, and was signed by three hundred and eighty-two, including the leaders of the equity bar with two exceptions, and twenty-six leaders of the common law bar. November 21st, in response to this requisition, the Attorney General called a meeting of the bar, to be held December 2d, in the dining hall of Lincoln's Inn, "For the purpose of ascertaining the opinion of the bar as to the existing system of law reporting, with a view to the amendment thereof."

This meeting was duly held, and it is estimated that seven hundred members of the bar attended. It was the opinion of the meeting that the system of reporting required amendment, and a committee of twenty-two, composed of distinguished law officers and leaders of the bar, was appointed to prepare a plan to that end. The committee at once set to work. Invitations to the number of several thousand were sent to the judges and profession, requesting suggestions. Among the number of responses printed by Mr. Daniel, those of Lord St. Leonard, G. W. Hemming, Esq., and Joshua Williams, Esq., are of especial value. A sub-committee obtained facts, and reported as to the mode of recording and reporting decisions in Europe and the United States. The committee did not agree as to the method of reform, but, a report was signed by sixteen of the twenty-two, and was submitted to a meeting of the bar July 1, 1864. The report set out the doings of the committee and contained a scheme of reporting. This provided; 1st, That the reports should be under the supervision of a council of reporting, composed substantially as suggested by Mr. Daniel in his letter of September 12, 1863. 2d, That the reports

should be prepared by reporters under the supervision of editors,—all cases useless as precedents to be rejected. 3d, That there be two editors with salaries of £600 each, and twenty-four reporters with salaries from £500 to £100 each. All the salaries aggregated £10,700, of which one-half was to be payable on a contingency as to profits. The editors and reporters to be barristers, to be appointed and removed by the council, the appointment to be subject to the approval of the judge of the court in which he was to report. In selecting reporters, preference to be given existing reporters. 4th, The profession to be invited to subscribe to the reports according to a scale of prices submitted, payable in advance, not to exceed 5£ 5s. per annum for the entire set, unless the total subscription fell below £10,000, when a new subscription might be issued at advanced rates. The proceeds of sale of reports to be applied to expenses of publication, other expenses and salaries of editors and reporters in a certain order, and lastly to augmenting the salaries of editors and reporters, and to prove a reserve fund to meet certain contingencies.

This scheme was disapproved of by several men whose judgment was entitled to respect, and was actively opposed by several of the existing reporters. But at an adjourned meeting of the bar, November 28, 1864, the report of the committee was adopted. Shortly after this the societies of the Inner and Middle Temple, of Lincoln's Inn and the Incorporated Law Society elected members of the Council of Law Reporting. Gray's Inn and Sergeant's Inn did not concur until after the scheme was well established and they had received a second invitation.

Negotiations were now begun with parties in interest, and subscriptions were circulated. It was not clear that sufficient money would be pledged, or that fair terms could be made, because of the uncertainty of the venture. But a most advantageous contract was made with William Clowes & Sons, printers, and a three years' guarantee of the first half of the salaries of the editors and reporters having been signed by a sufficient number of barristers, no trouble was had with persuading most of the old reporters to join in the enterprise.

The judges generally sanctioned the affair, and November 2, 1865, the new reporters took their seats in the several courts in Westminster Hall, Lincoln's Inn and at the Rolls in Chancery Lane. January 1, 1866, the first volume of the new series of "The Law Reports" was issued.

The subscriptions had amounted to over £20,000 and 5,000 volumes were printed. There was no longer doubt as to the financial success of the scheme. The annual reports of the Council of Law Reporting, which is now incorporated, tend to show that lawyers are capable of being financiers. At least by the report of 1883, the latest to which the writer has access, it appears that the subscriptions for 1883 are £25,732. The total receipts, including *income from investments*, £29,247. Receipts in excess of expenses, £6,455. And that not only have the weekly and permanent Reports been furnished to subscribers for £4, 4s., instead of £5, 5s., as at

first, and £30 to £50 under the old system, together with extra volumes, such as digests and sets of the statutes, but the reporters and editors have received their salaries and bonuses from time to time, and a contingent fund of £20,000 has been accumulated from which to pension off superannuated reporters.

An inspection of the title pages of the Law Reports will show that most of the old reporters joined the staff of the new reporters. This is true of all but three, Mr. Beavan, Mr. Hurlestone and Mr. Smith, and their reports soon ceased to appear. June 10, 1869, in the preface of the 36th and last volume of his reports, Mr. Beavan said, "More than thirty years have now elapsed since this, the longest series of authorized reports ever published, was commenced," and after expressing his obligations to the several branches of the legal profession concluded "with these remarks I take leave of the profession in my character of the last of the authorized reporters of the court of chancery and commit my three dozen volumes to their indulgent readers."

It would be profitable to give the plans suggested in opposition to the scheme of Mr. Daniel and consider whether if one or more of them had been adopted the Law Reports might not to-day be somewhat nearer the ideal of scientific reports. It is not uncommon to read criticisms on the Law Reports, unfortunately most of them are trifling and undignified. Certainly it may be affirmed that the profession in England and America is under obligation to Mr. Daniel and the Council of Law Reporting for initiating and maintaining so excellent a series of reports. Inaugurated so auspiciously, maintained so sumptuously, and edited so intelligently, it is possible that the "Law Reports" may become a considerable factor in aiding in a solution of the problem of whether the embarrassment of the legal profession and the public by reason of the super-abundance of reports shall find relief in codification or in a more and more scientific system of reporting case-law.

THE POWER OF APPOINTING ELECTORS, ORIGINAL OR DELEGATED.

HON. BYRON M. CUTCHEON.

Professor Thompson, of the University Law Department, in the March number of the MICHIGAN LAW JOURNAL, comes to the defense of the district system of appointing presidential electors, and therein bases an attack upon my argument against that system on my statement that "the power of a State to appoint presidential electors is a delegated power and delegated only. It is not among the natural and inherent rights of States."

It may be conceded, perhaps, that the statement was not essential to the argument, and that the contention might have safely rested upon the plain and express words of the Constitution limiting the power of appointment to the State only.

In deciding the question whether the power is original in the several States, or conferred by the Constitution, it will be necessary to take a glance at its historical development. In the evolution of our nationality first came the Congress of Delegates of 1774, which assembled in Philadelphia in September of that year. This Congress did not claim any national character. It was rather the organ of a united opposition to the aggression of England. Next in order came the Declaration of Independence, July 4, 1776, which made the American Colonies *de facto* a separate people under the name of The United States. On June 11, 1776, a committee had been appointed by Congress to prepare the plan of a Confederation to be entered into between the Colonies, and the report of that committee was agreed to in November, 1777; but it was not until 1781 that all the States agreed to the Articles of Confederation.

These Articles, as the name implies, established a federal government but not a national union.

These Articles do not stand in the name of "The people of the United States," but in that of the several States as separate sovereignties. Article 2 provides that "Each State retains its sovereignty, freedom and independence." Article 5 provides that "Each State shall maintain its own delegates in a meeting of the States." These Articles provided for a Congress but for no President or other separate Executive. This condition continued until 1787, when the Constitutional Convention assembled in the name of "the people of the United States" "in order to form a more perfect union."

Up to this time the States had retained their "sovereignty, freedom and independence," with all that the words imply. They each had the "natural and inherent right" to do in and for themselves all that sovereign States might of right do, except in so far as they had limited themselves in the compact of confederation.

But now a new and larger entity appears upon the scene, assuming to speak in the words, "We the people of the United States," whose acts, when ratified by those people, constituted a national union, not as a creature of the several *States*, but as a creation of the *people* of all the States. Under this Constitution—whatever might have been the case before—every power is derived directly from "the people of the United States," for whom it speaks.

The several States retained their rights as separate States—the right of self government, the regulation of their local and domestic affairs, their internal police, the organization of their State and municipal governments, the subdivision of their territory, and all the other powers and privileges which they had theretofore possessed, and which they had not by ratifying the Constitution surrendered to the national government, such as the right to make treaties, coin money, emit bills of credit, maintain an army, etc.

But the right and power to appoint presidential electors the separate States had never possessed, because a separate National Executive had never before existed, and was only brought into being by the people of the United States speaking through the Constitution. But now, speaking through that august instrument, they said, "We the people of the United States, in order to form a more perfect union, * * do ordain * * Each State shall appoint * * a number of electors equal to the entire number of Senators and Representatives to which the State may be entitled in Congress." Then, and not till then, the State became seized of the power and charged with the duty to appoint electors. It was not an inherent power, because it did not pertain to the old Statehood, but to the new Nationality. It was not among the powers "reserved" to the States, because it had never been theirs to reserve. But it was a power inherent in "the people of the United States" as a nation, which they summoned into exercise through the Constitution.

It was a matter of long debate and anxious deliberation in the convention that framed the Constitution how "the Supreme Executive" should be constituted.

Mr. Randolph proposed in "the Virginia Plan" [May 27, 1787] that it should be "by the national legislature," and the convention agreed to this [June 2]; yeas, 8, nays, 2. On the same day, Wilson, of Pennsylvania, proposed that it should be "by electors elected by the qualified voters in *districts* into which the States should be divided." The convention refused to take up Wilson's motion; yeas, 2, nays, 8. Then, on June 9, Mr. Gerry moved that the Executive should be "chosen by the executives of the several States." This was rejected. Yeas, none: nays, 10; divided, 1. On

June 18, Col. Hamilton moved that it should be "by electors chosen by electors chosen by the people." This was not even seconded, and was not voted on. On June 19, the committee of the whole house reported favorably on Randolph's proposal that he should be elected by the "*national legislature*," and this was agreed to *unanimously*.

After much more debate and reconsideration, the convention again voted on July 24, on motion of Mr. Houston, that the Executive should be elected "by the national legislature;" and once again on July 26, the "grand committee" of one from each State, reported in favor of the form "to be chosen by the national legislature," and the convention adopted the report; yeas, 6, nays, 3; divided, 1. And now it went to the committee on detail, one from each State, who on August 6 reported that "He [the Executive] shall be elected by ballot by the legislature." Even after this, Carroll, of Maryland, endeavored to secure a change, and moved, August 24, to substitute "by the people," but it was rejected; yeas, 2, nays, 9.

It cannot fail to be noticed that thus far the convention had steadfastly stood for the election of the National Executive by the national legislature, thus declaring it strictly a national function from the day of the presentation of Mr. Randolph's plan, May 27, to the rejection of Carroll's motion to elect "by the people," August 24, with only one brief exception, now to be noted. On July 19, Mr. Ellsworth, of Connecticut, moved to substitute "to be chosen by electors, to be appointed for the purpose, by the legislatures of the States," and this then passed in the affirmative; yeas, 8, nays, 2; but on July 23, the next time it came up, this vote was reconsidered by 7 to 3, and on the next day the convention restored "by the national legislature" by yeas 7, nays 4.

It will thus be seen that for almost three months, through every sort of suggestion and proposal, the convention adhered to election "by the national legislature," and in this form it was recommitted to a grand committee of all the States, on August 31, which committee on September 4 reported the clause substantially as it now stands in the Constitution—"Each State shall appoint, in such manner as the legislature may direct, a number of electors equal to the whole number of Senators and Members of the House of Representatives to which the State may be entitled in the legislature."

From this recital of history several things stand out prominent. First, the convention rejected the "district system," when proposed, by a most decisive vote, 8 to 2. Second, that it rejected election by the people *en masse*, by a still more decisive vote. Third, that the convention held, throughout, that the election of a President of the United States was a matter of National and not of State jurisdiction. Fourth, that the convention did not regard it as "one of the inherent rights of a State" to appoint electors of a National Executive. In effect the convention declared, "We the people of the United States," in selecting our National

Executive will use the State organizations as convenient agents, and therefore "each State shall appoint," etc.

It was a power and duty now first created, and which but for the action of the United States as a whole would never have existed, entrusted by the action of the whole to the individual States. It was either a power original and pre-existent in the States in their separate capacity, or it was "delegated" to them by that greater sovereignty then created. By its very nature it could not have pre-existed, for the Nation was now first created. It was not original with the States separately, but sprang into life through the Constitution as a part of that great reserve of power which gave to all the people of the thirteen separate States the right to create a nation.

The powers referred to in the tenth amendment as "reserved" to the States, are the powers which were inherent and pre-existent in the several States as such; and the rights reserved to the people, are the rights which belonged to the people in their primary capacity.

The power to constitute a national government "inheres" in "the people of the United States," and they have "ordained," not that each *district* shall appoint, but that "each *State* shall appoint * * electors," and the power must be executed in accordance with the grant, or it is not executed within the meaning of that "sublime imperative" of our great charter.

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE, Editor and Business Manager.

H. D. JEWELL,

Managing Editors.

ELI R. SUTTON.

ASSISTANT EDITORS.

J. E. ROBERTS,

W. M. HARVEY,

ARTHUR WEBSTER,

O. B. VANHORN.

Published monthly, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

THE MICHIGAN LAW JOURNAL has met with such flattering success that it has been decided to continue its publication through the summer. Instead of nine numbers a year, there will be twelve, and it will hereafter be made a regular monthly publication. Those who have already subscribed at the special price of \$1.00 will be entitled to the JOURNAL until June. By the payment of \$1.50 additional, the JOURNAL will be sent to them until February, 1893. We would not be able to offer the JOURNAL at so moderate a price, were it not supported so well by the profession.

THERE are erratic judges and as a consequence erratic decisions and opinions. The opinion of Judge Taft of the Supreme Court of Vermont, in the case of *Baker v. Jacobs*, 23 Atl. Rep., 588; contains some very peculiar reasoning. In this case, the plaintiff, after the verdict had been rendered in his favor, treated the jury to cigars. This, the court held was in violation of the statute of Vermont, (Sec. 997) which provides that: "If a party obtaining a verdict in his favor shall, during the term of the court in which such verdict is obtained, give to any of the jurors in the cause, knowing him to be such, any victuals or drink or procure the same to be done, by way of treat, either before or after such verdict, on proof thereof being made, the verdict shall be set aside and a new trial be granted." The court held that treating with cigars was practically "giving drink by way of treat," and that the granting of an order of a new trial was proper under such statute.

There is probably no question, but that the decision in this case was in accordance with the spirit and intent of the statute. The principal opinion of the court construes the statute very rationally and liberally, but the concurring opinion of Judge Taft is a very peculiar specimen of judicial reasoning. We give it in full: "I concur in the result. Tobacco is both a victual and drink. It is taken as a nourishment, sustenance, food, etc.; therefore, a victual. It is not an obsolete use of the word to call it

drink. Joaquin Miller says: 'I drink the winds as drinking wine.' If a man can drink wind, I think he can drink tobacco smoke, vile and disgusting as it is. A man is compelled to drink it, by having it puffed in his face on all occasions and in all places, from the cradle to the grave. It is a drink. Set aside the verdict."

THE LAW JOURNAL, London, England, asks the question, "Do the 'apprentices' of the law ever hold 'moots' nowadays, as was formerly the custom in the halls of the Inns of Court after dinner?" It gives the picture of such a 'moot' over a lengthy question of law, "in which should take part, Mr. Splithair, recently from Oxford; Mr. Shaveblock, fresh Cambridge; Mr. Cornstalk, from Sydney, N. S. W.; and Mr. Rung Jung Jellybag, from Bengal. The case would be one recently decided by the Court for the Consideration of Crown Cases Reserved. Can a prisoner be convicted of an assault with intent to rob a person who did not appear to have anything in his pocket which could be stolen? There has been a decision that he could not; but that decision has been overruled by no less than nine judges. Obviously for a person to be robbed, it is not essential that he should have any property in his pockets. You cannot, says the proverb, 'get breeks off a Highlander.' Still you may assault him with intent to steal his kilt, or his bonnet, or his sporran, although they may not be a bawbee in it. At the same time it might occur to the mind of Mr. Rung Jung Jellybag, from Bengal, to ask this question. There is a slang expression 'I'll have your hat.' Now, if A. hits B. in the eye, exclaiming simultaneously that he will have B.'s hat, can A. be convicted of an assault with intent to rob B. of his headgear? The question is not so trivial as it might seem to be. Some years ago a London blackguard, known as 'Caannon the ruffian sweep,' was transported for life for knocking down a policeman. But the ruffian, as he smote the municipal functionary, yelled, 'I'll kill you,' and he was indicted and convicted of an attempt to murder."

It is hardly probable that the law students in the club courts at American law schools, which correspond to the English "moots," ever trouble themselves about questions of this character. They rather employ their time in discussing cases which involve what might be called "common every-day law," since that is what they are more likely to first meet with, when admitted to practice.

THE ORIGINAL SOURCES OF THE FEDERAL CONSTITUTION.—From a great majority of the school histories, the children of the United States are taught that the Constitution of the United States is not a growth, but that it was struck out as an original instrument by the convention which framed it. No mistake could be greater. Our Federal Constitution illustrates the grand results of political evolution. Any Constitution, to be effective, must have wrought into it ideas centuries old. When, therefore, our delegates met in convention for the purpose of adjusting the powers of a new government they would be likely to appropriate the excellencies of all systems of government with which they were familiar. That our statesmen of this period were profound students of political history no one can gainsay, and this is evidenced by the writings in the *Federalist*, the debates in the various conventions, and such treatises as Monroe's "The People the Sovereigns," and "Defenses of the Constitution," by John Adams. Edmund Burke, before the Parliament declared: "In no

country perhaps in the world is the law so general a study. * * * * I hear that they have sold nearly as many copies of Blackstone's Commentaries in America as in England."

In the convention of 1775, all the delegates favored a rigid written Constitution; its need had been demonstrated by a long series of oppressions, culminating in the Revolution. That a written instrument afforded a check to arbitrary power had been taught by *Magna Charta*, and our fathers felt that if a Great Charter could accomplish so much, much more effective would be a Great Constitution which should embody *all* the powers of the state. While the ancient constitutions of Solon, of Lycurgus, and the laws of many early states have contributed to our Constitution, its more immediate origin may be traced to the writings of philosophical statesmen of the century preceding the Revolution. The definitions of treason, felony, and other terms of legal import, are found in old legal statutes. Individual liberty, in the very words of the Constitution, is guaranteed by the Bill of Rights. Prof. Dwight thinks that our Constitution owes more to James Harrington than any other single individual. This great writer was born in 1611, and after devoting a long life of opposition to arbitrary power, left to posterity his immortal work *Oceana*. Herein appeared first a sketch of a written constitution limiting sovereign power. This constitution, he argued, must be ratified by the people, and not merely adopted by Parliament. It should have all the binding force of *Magna Charta* and this additional, that it would be binding upon Parliament. In it he uses language, many of the entire sentences of which have been copied verbatim in the constitution of Massachusetts and those of other states. Not Montesquieu, nor Hobbes, nor all the other great minds of that century, foreshadowed so completely the American Constitution as did James Harrington. Nearly every deviation from the great model, the British constitution, was influenced by the author of *Oceana*.

The charter of a private corporation is a written constitution of the corporation. The British East India Company was organized under a written charter drawn after the plan proposed in *Oceana*. The growth and prosperity of the company under the charter was phenomenal, so that in the days of Warren Hastings this charter had become the fundamental law of the richest, and next to China, the most populous country in the world. The American colonists sought and obtained like charters and in all their troubles they held up as a shield these written documents, until they acquired for them a sort of superstitious reverence. Prof. Andrew McLaughlin, in a series of lectures before the post-graduate class of the law department of the University of Michigan has shown that our Federal Constitution had an historical precedent actually in force in the state of Connecticut; that here the people came together, and voluntarily adopted a written body of rules by which they agreed to be governed. This was probably the first example of a written constitution actually in force, adopted by the people themselves. With the example of Connecticut, with the charters of the states, with the lessons taught by *Magna Charta*, the Articles of Confederation, and past governments, before them, the American statesmen of the Revolutionary period formulated an instrument under whose protection a central government with powers as clean cut as a marble statue, has grown up, which does not, and cannot, interfere with the reserved rights of the people in the sovereign states. Thus has the flower of freedom reached its most perfect bloom.

LATE DECISIONS OF THE MICHIGAN SUPREME COURT.

McLAUGHLIN v. BURROUGHS.—*Decided Feb. 18.*—(Per Curiam.)

Mandamus—Removal from Office—Power to Compel Discretionary Act—Remedy at Law.—Five citizens and electors of Detroit signed a petition, duly verified, to the governor, praying for the removal from office of Alderman James Lennane, on the ground of official misconduct as chairman of the board of election inspectors in a certain voting district. The petition, accompanied by many affidavits, was presented to the respondent, the prosecuting attorney, requesting him to endorse thereon his opinion that the case demanded investigation. These proceedings were in accordance with §653, How. Stat., which provides that the Governor shall take no action upon any such charges until the same shall have been exhibited to him in writing verified by the affidavit of the party making them, "with a statement of the prosecuting attorney of the county that in his opinion the case demands investigation." Respondent refused to attach such a statement. Petitioners apply for writ of mandamus to compel the respondent to make and attach to said petition a statement that in his opinion the case demands investigation. Respondent alleges in answer that he has examined the petition and that in his opinion the case does not demand investigation.

Held, that the Governor can obtain jurisdiction over the removal of an officer only in the method provided by statute, and the proceedings must be strictly followed. (Dullam v. Wilson, 53 Mich., 398; Matevier v. Therrien, 80 Mich., 188.) Only when such officers refuse to act has this court jurisdiction, and that extends no further than to set them in motion and compel them to take action. When such officers under the law have exercised their discretion, this court cannot review it. (People v. Judge of Probate, 16 Mich., 203; People v. Judge, 20 Mich., 220; Mixer v. Supervisors, 26 Mich., 422; People v. Judge, 39 Mich., 123; Houghton County v. Auditor General, 36 Mich., 271.) Section 45, Act No. 190, Public Acts of 1891, provides a legal remedy for such violations of the election laws.

PEOPLE v. HUGHES.—*Decided Feb. 19.*—(McGrath, J.)

Keeping Saloons Open on Sunday—Rooms Connected With Bar.—An office or billiard-room, in which liquors are served and imbibed when the bar is lawfully open, must be regarded as parts of the saloon, under the closing law; and if kept open on Sunday it will be a violation of the statute. (People v. Ringsted, decided same day by Morse, C. J., a similar decision is rendered.)

PEOPLE v. CROWLEY.—*Decided Feb. 19.*—(Morse, C. J.)

Keeping Saloons Open on Sunday—Evidence to Convict—Right of Bar-Tender to Frequent Saloon on Sunday.—A saloon keeper or his family have a right to enter the saloon on Sunday for necessary purposes; but the bar-tender, who is not a member of the family, has no more business in the saloon to get a drink on Sunday than any other person, and if he frequents the place on that day the owner may properly be convicted.

DAYO v. PROVINSKI.—*Decided Feb. 19.*—(Grant, J.)

Replevin—Parties—Jurisdiction in Replevin.—The owner of personal property, or one entitled to its possession may bring suit therefor in any court having jurisdiction over the action of replevin and of the parties to the suit. He is not required to ascertain, before bringing suit, by what claim in the wrongful possession of his property claims to hold it, nor to plant his suit in the same court as that from which an attachment or execution is issued. (Weber v. Henry, 16 Mich., 399.)

PEOPLE v. WRIGHT.—*Decided Feb. 19.*—(Montgomery, J.)

Conviction for Keeping House of Ill Fame—Evidence—Alders or Abettors.—Where the gist of the charge is keeping a house of ill-fame it is not error for the trial judge to refuse to compel the prosecuting attorney to call a witness to a transaction which does not constitute the offence, but is only one of the circumstances

in proof. The charge of keeping a bawdy house may be supported by proof that the respondent aided or assisted others in the commission of the offence. (*Commonwealth v. Garnett*, 1 Allen, 7.)

BROTHERTON V. GOLDMAN.—*Decided Feb. 19.*—(Grant, J.)

Trover—Title in Plaintiffs—Right of Defendant to Question Plaintiffs Title.—Action or trover for the conversion of a certain quantity of railroad iron. *Held*, that in an action for unlawful conversion of property, it is sufficient if the plaintiffs show a *prima facie* right to bring their action. The parties from whom plaintiffs claim to derive their title are the only ones who can question their right to bring the action; if they choose to ratify the transaction the defendants, who are wrong doers cannot attack it directly or collaterally.

PEOPLE V. STOTT.—*Decided Feb. 19.*—(Montgomery, J.)

Recorder's Court—Right to Determine Question of Title—Setting aside Conviction on.—Defendant was prosecuted in the Recorder's Court of Detroit, under a city ordinance, and convicted of the charge of obstructing and encumbering a public alley. The defendant's good faith in attempting to maintain his alleged title to the *locus in quo* was not questioned on his trial. *Held*, that the question of title could not be tried in such proceedings, and a conviction under such circumstances cannot be sustained. (*Beecher v. People*, 38 Mich., 291; *Jackson v. People*, 9 Mich., 122; *Roberts v. Highway Commissioner*, 25 Mich., 23; *Willson v. Gifford*, 42 Mich., 454; *Gregory v. Knight*, 50 Mich., 61.)

PEOPLE V. RAUM.—*Decided Feb. 19.*—(McGrath, J.)

Service as Jurors—Persons Exempt—Challenge for Cause.—Persons over sixty years of age are exempt from serving on jury in this state by statute; but the right to claim the exemption is personal to the juror, and he is not, by reason of such exemption, subject to challenge for cause. (*Greene v. State*, 59 Me., 123-128; *Stall v. Forshner*, 43 N. H., 89; *Moon v. Cass*, 10 Kan., 288; *Davidson v. People*, 90 Ill., 221; *Breeding v. State*, 11 Tex., 257; *Booth v. Commonwealth*, 16 Grat. (Va.), 519; *Murphy v. People*, 37 Ill., 447; *State v. Miller*, 2 Black, (Ind.), 35; *State v. Quimby*, 51 Me. 395; *State v. Adams*, 20 Iowa, 486; *Monroe v. Brigham*, 19 Pick., 368; *Glasinger v. State*, 24 Ohio St., 206; 1 *Greene's Prac.*, 562; 1 *Bish., C. R.*, 853-926; *Thompson on Trials*, § 11; 12 *Am. & Eng. Encyc. of Law*, 326-7.

COGSWELL V. MITTS.—*Decided Feb. 19.*—(Montgomery, J.)

Garnishee Proceedings—Indebtedness Created After Writ Issued—Jurisdiction.—Complainant applied to defendants for a loan on chattel mortgage. After mortgage was drawn, but before check for money was given the defendants were served with writ of garnishment. Garnishee suit, as well as principal suit against complainant, was prosecuted to judgment, and mortgage assigned to plaintiff in garnishee proceedings, and note endorsed to him. Bill to compel delivery of the note and mortgage for cancellation. *Held*, that a garnishee process cannot reach an indebtedness created after the issue of the writ. (*Miller v. Hitchcock*, 48 Mich., 603; *Hopson v. Dinan*, 48 Mich., 612; *Post & Tribune Co. v. Riley*, 46 Mich., 459.) The transaction did not create relation of debtor and creditor. (*Shipman v. Graves*, 41 Mich., 675; *Booram v. Crane*, 103 Mass., 522; *Wood v. Jendevine*, 39 Mich., 590; *Thatcher v. St. Andrew's Church*, 37 Mich., 264; *Benj. on Sales*, 268.) The case is one properly within jurisdiction of court of equity. (*Sherman v. Fitch*, 98 Mass., 59; *Martin v. Graves*, 5 Allen, 601.)

WOOD V. MICHIGAN AIR LINE RY CO.—*Decided Feb. 19.*—(Montgomery, J.)

Ejectment—Railway Companies—Rights of Owners to Revoke Parol License.—Action of ejectment to recover possession of a strip of land extending across plaintiffs farm, and comprising the right of way of defendants. Plaintiff had given a contract to convey to defendants a right of way, not exceeding sixty-six feet in width, "on the route lately surveyed by said company." *Held*, that the land intended to have been conveyed was such as was required for a right of way through plaintiffs land on the line or route surveyed through his land, and to entitle the defendants to the land as a right of way the road must have been built substantially in conformity to said survey. By merely permitting the company to build on another survey it is not presumed that the plaintiff has given another right of way, but the presumption is that he does so expecting to be compensated in damages. This case falls within the provisions of the statute of frauds that no interest in lands shall be created or transferred otherwise than by deed. (*Hayes v. Livingstone*, 34 Mich., 355;

Bank, 6 Conn., 233; Railway Co. v. Clagham, 1 Speer's Eq. (S. Car.) 545; Bank v. Whittle, 78 Va., 739; Whitehall v. Warner, 20 Vt., 444; Holt v. Burnett, 16 N. E. Rep., 6; Twin-Lick Oil Co. v. Marbury, 91 U. S., 587; Wilkinson v. Baurle, 7 Atl. Rep., 314)

PEOPLE v. BEHRE.—Decided Feb. 19.—(Long, J.)

Criminal Law—Obtaining Money by False Pretence—Sufficiency of Information—Necessary Averments.—When money has been obtained from an agent by false pretences, unless the information set forth that the agent had power to pay out the money for the principal it is not sufficient to warrant a conviction for obtaining the money by false pretences belonging to the principal; all the national facts and circumstances necessary to constitute the offence, whether by rule of the common law or by statute, must be set forth. (Jacobs v. State, 51 N. W. Rep., 422; People v. Olmstead, 30 Mich., 439; Enders v. People, 20 Mich., 233.) It is necessary to aver, not only that the respondent well knew the representations to be false, but that representations were false in fact. (People v. Reynolds, 71 Mich., 343.)

ROYCE v. AUDITOR GENERAL.—Decided Feb. 19.—(McGrath, J.)

Taxes—Setting aside Tax Deed—Burden of Proof of Illegality—Taxes for Construction of Highway under Constitution.—Bill to have certain taxes levied upon lands of complainant, and returned to the county treasurer as delinquent for non-payment thereof set aside, and the cloud created upon complainant's title thereby, removed. *Held*, that the burden of proof is upon the party attacking a tax-deed to show its illegality. (Boyse v. Sebring, 66 Mich., 223; Robbins v. Barron, 33 Mich., 124; Upton v. Kennedy, 36 Mich., 215; Hunt v. Chapin, 42 Mich., 24.) Illegal apportionments by the board of supervisors are mere misappropriations which cannot affect the validity of the tax. (Wright v. Dunham, 13 Mich., 314; Penn. Iron Co., v. Chrystal Falls, 80 Mich., 510.) The board of supervisors have no authority to determine the amount of a tax upon township for township purposes. The constitutional provision (Art. X, § 9) authorizing the raising of taxes for constructing or repairing highways, relates to a county tax for that purpose, and then only for the construction and improvement of state and territorial roads. (Attorney General v. Bay, 34 Mich., 47.)

BANK OF MONTREAL v. POTTS SALT & LUMBER CO.—Decided Feb. 19.—(Montgomery, J.)

Insolvent Corporations—Right to Give Preference to Creditors by Mortgage—Preference to Stockholder or Director.—Bill to foreclose mortgage to secure creditors and to have receiver appointed. *Held*, that it is not unlawful in this state for a corporation, although insolvent, to give preferences to its creditors by way of mortgage. (Town v. Bank of River Raisen, 2 Doug., 530; Kendall v. Bishop, 76 Mich., 635; Turnbull v. Lumber Co., 55 Mich., 396; Hills v. S. & D. Furniture Co., 23 Fed. Rep., 434.) When the corporation becomes insolvent the directors do not become trustees for all the creditors alike, in such sense as to prevent their giving valid security by way of preference to one of the stockholders or directors. (Cited, Buell v. Buckingham, 16 Iowa, 284; Hallam v. Indianola, 56 Iowa, 179; Garrett v. Burlington Plan Co., 29 N. W. Rep., 395; Smith v. Skeary, 47 Conn., 54; Catlin v. Burns v. Martin, 45 Mich., 22; Cook v. Stearns, 11 Mass., 533; Desloge v. Pearce, 38 Mo., 360; Houston v. Laffee, 40 N. H. 505; Winslow v. Cooper, 104 Ill., 235.) A parol license to railroad company to enter upon land and construct its road is revocable at the will of the owner. (1 Rorer on Railroads, 321; Murdock v. R. R. Co., 74 N. Y., 579; Irish v. R. R. Co., 44 Ia., 380.)

AYRES v. GARTNER.—Decided March 3.—(Per Curiam.)

Collusion, Omission of Oath Relating to—Mandamus to Dismiss Bill.—Where complainant, in a bill for divorce, fails to comply with the statute requiring recitation of an oath that there is no collusion between complainant and defendant, and where complainant has obtained a preliminary injunction, a writ of mandamus will issue to compel the circuit judge to dismiss the bill and dissolve the injunction. (People v. McCaffrey, 75 Mich., 123.)

TINSMAN v. BOARD OF SUPERVISORS OF MONROE COUNTY.—Decided March 3.—(Per Curiam.)

Taxation—Irregularities in Assessment—Construction of Drain—Estoppel.—Mandamus will not issue to compel the board of supervisors of a county to spread a tax upon a certain description of land, (over which land and certain other lands a drain commissioner has obtained a right of way by condemnation and has assessed the lands for the construction of a drain,) where the commissioner has assessed such

land to the wrong person as owner and upon learning of this fact entered it upon his roll as unknown. These are such irregularities in its assessment that the board of supervisors were warranted in directing that the tax should not be spread upon that description, and the owner of the land is not estopped from setting up these irregularities because he entered into a contract to construct a portion of the drain.

AYRES V. GARTNER.—*Decided March 3.*—(Per Curiam.)

Divorce—Statutes against Collusion—Mandamus to Dismiss Bill not Containing Statutory Oath.—§6232 How. Stat., providing against collusion between complainant and defendant in divorce cases, is a mandatory statute, and if a bill for divorce is filed which does not recite the oath that there has been no collusion, etc., as provided by the statute, mandamus will issue to dismiss the bill and dissolve a preliminary injunction granted thereon. This defect can not be waived by any act of the defendant's. (*People v. McCaffrey*, 75 Mich., 123).

PEOPLE V. SLACK.—*Decided March 4.*—(Grant, J.)

Criminal Law—Manslaughter—Intoxication as Defense.—One who unlawfully carries a deadly weapon, knowing that he is in the habit of getting intoxicated, and while intoxicated kills another, is guilty of manslaughter, whether he knowingly drew his pistol for that purpose or whether he unknowingly committed the act in a state of voluntary intoxication.

PEOPLE V. BRADY.—*Decided March 4.*—(Long, J.)

Physicians—Duty to Report Infectious Diseases—Reasonable Time.—Under §44, Act No. 11, Public Acts of 1883, providing for the reporting by physicians of infectious diseases, it may be properly left to the jury to determine what is a reasonable time within which to report the existence of the disease. In cases like diphtheria, where the disease is virulent and rapid in its action, it not error in the court to direct that eight days was not a reasonable time.

HURSLEY V. AUDITOR GENERAL.—*Decided March 4.*—(McGrath, J.)

Detroit House of Correction—By Whom Fees of Sheriffs for Conveying Prisoners to be paid.—Under the statute which authorizes the sentencing of persons, between certain ages, who have been convicted of a state's prison offence, to the Detroit House of Correction, that institution is made, for their confinement, a state prison, and they are state prisoners. Sheriffs who convey such prisoners to it are entitled to be paid in the same manner that they are paid for conveying prisoners to the state prison.

TOWNSHIP OF BUCKEYE V. CLARK.—*Decided Mar. 4.*—(McGrath, J.)

Townships—Actions against Township Officers—Right to Sue in Assumpsit—Bill of Particulars.—Where a township officer has unlawfully secured township orders and used them as money, the law will raise an implied promise to pay the amount, and an action of assumpsit as well as tort will lie. A township is a body, corporate, and as such may sue and be sued. (*Bowen v. School District*, 28 Mich., 149.) An application for a more specific bill of particulars should be made in advance of the trial: an objection made upon the trial will be too late.

OVID ELEVATOR CO. V. SECRETARY OF STATE.—*Decided March 4.*—(Per Curiam.)

Corporations—Power to Extend Corporate Existence—Construction of Statute.—Under 3, How. Stat. 4161, d. 2, providing for the extension of corporations "whose corporate existence is about to terminate by limitation of law," the words "limitation of law" apply only to statutory or constitutional limitations, and not to limitations expressed in the articles of association. By the provisions of the same act, the term of corporate existence fixed by the articles of association may be amended as well as any other provisions of said articles.

GILL V. DE ARMANT.—*Decided March 4.*—(Long, J.)

Replevin—Fixtures—Attachment of Personality to Realty.—Personal property though affixed to real estate, will remain personal estate, if the understanding to that effect is clearly indicated as fairly deducible from the circumstances. The property of another attached to realty without the consent of the owner, does not become a part of the realty so as to prevent the owner from bringing an action of replevin therefor. (*Manwaring v. Jennison*, 61 Mich., 117; *Rogers v. Brokaw*, 25 N. J., Eq. 496; *Blanche v. Rogers*, 26 N. J., Eq. 563; *Voorhees v. McGinnis*, 48 N. Y., 278).

TISMAN V. SCHOOL DISTRICT.—*Decided March 4.*—(Grant, J.)

Evidence—Impeaching Testimony—Rights of Lessees.—Testimony used for impeaching a witness, not party to the suit, cannot be used to establish any material fact in the case. (*Howards v. Patrick*, 38 Mich., 304; *Brown v. Deane*, 52 Mich., 269; *Catlin v. M. C. R. R. Co.*, 66 Mich., 358). A lessor who has received the full consideration for his lease cannot question the right of his lessee to hold.

HEATON V. EDWARDS.—*Decided March 4.*—(Grant, J.)

Real Estate Brokers—Right to Commission.—Where real estate has been placed in the hands of real estate brokers to sell, and they have found a prospective purchaser, with whom they are negotiating for a sale, the owner cannot then cancel their authority, effect the sale, and thereby avoid the payment of the commission. (*Chilton v. Butler*, 1 E. D. Smith (Ill.), 151; *Munro v. Edwards*, 86 Mich., 91.)

LE COMPTE V. LUEDERS.—*Decided March 4.*—(Long, J.)

Trespass—Boundary Line between Town Lots.—Purchasers of town lots have the right to locate their lot lines according to the stakes set by the plat of the lots; and if a fence has been built between two of the lots on the line indicated by these stakes, and continues on said line until the parties to the suit bought the lots, no subsequent survey can be alleged to unsettle such lines. *Flynn v. Glenny*, 51 Mich., 580 followed.

WEBER V. CHILDS.—*Decided, March 4.*—(Long, J.)

Chattel Mortgages—Preferential Assignment.—Chattel mortgagees, although they have not accepted under the terms of their mortgage, and who claim that they have been deprived of their right to a fair share of the property, cannot compel prior mortgagees to declare an assignment with preferences, and to hold the property, covered by the mortgages, in trust for all the creditors. *Warner v. Littlefield*, 50 N. Y. R., 221 and *Fitz Gerald v. McCandlish*, 50 N. Y. R., 360, followed.

SCHOOL DISTRICT V. CLARK.—*Decided March 4.*—(Morse, C. J.)

School District—Legality of School Meeting—Parol Evidence by Aid Record.—Parol evidence is admissible to aid an incomplete record, and to show that a certain school meeting was an adjourned annual meeting. (*Taymouth v. Koochlea*, 35 Mich., 24). In case of a defaulting assessor, the electors of the school district may, at a regular legal meeting, authorize a settlement of the matter, and direct that the amount due may be paid in part by town orders, guaranteed by a responsible party; and if such proceedings are taken, the guarantor has no legal or equitable defense.

PEOPLE V. LANGE.—*Decided March 4.*—(Grant, J.)

Jurors—Right of Justices of Peace to Serve—Parol Evidence to Prove Contents of Lost Documents—Arguments of Counsel.—Justices of the Peace are competent to act as jurors; their exemption is a personal privilege not subject to challenge for cause. When books disappear under suspicious circumstances and their loss is not sufficiently proven, parol evidence is not competent to prove their contents. It is the duty of trial courts to keep attorneys within the bonds of legitimate argument and to promptly check them when they exceed it, and failure to do so may become a ground for a new trial or a reversal of the judgment.

BENEDICT V. BUERMAN.—*Decided March 4.*—(McGrath, J.)

Descent—Right to Rents and Profits.—George E. Buerman died intestate, leaving property valued at \$5,000. His widow and five children survived him. Five years later his son, George C., died leaving a widow but no issue. One of the daughters married Benedict, and dying intestate, left as her only heir Julia L. Benedict, the defendant. In the meantime a portion of the land had been sold. Complainant prays that the sale may be set aside, and that she be decreed her portion of the rents and profits, etc. *Held*, that no case was presented under How. Stat., Sec. 5744, until proper steps be taken to set aside dower, and that the complainant is entitled to costs. (*Zoellner v. Zoellner*, 35 Mich., 624.)

APPEAL OF SEVERANCE.—*Decided March 4.*—(McGrath, J.)

Wills—Contesting of Wills—Undue Influence—Right of Court to Take Question of Undue Influence from Jury.—When a will is being contested on grounds of incompetency and undue influence the court may, under some circumstances, take the question of undue influence from the jury. Undue influence cannot be predicated upon opportunity alone, nor upon conduct in the time of filial duty, nor upon

a disposition of property not in accord with the statute of descent. Where the person of the testator has been committed by common consent to the care of him who is charged with the exertion of undue influence, there is no presumption that undue influence has been exercised. (*Maynard v. Vinton*, 59 Mich., 153.)

KINGSBURY V. KETTLE.—*Decided March 4.*—(Morse, C. J.)

Estoppel—Suit Against Husband and Wife.—The defendant and his wife contract for the purchase of fruit trees. When the stock was delivered the defendant gave his single note in payment. Mr. and Mrs. Kettle had been previously sued on the contract but a verdict of no cause of action was found. This action was now brought to recover on the notes. Defendant claimed, (1) that the suit in contract was a bar, (2) by election of remedies the plaintiff was estopped. *Heid*, that this suit against the husband and wife, under these circumstances, was no bar, nor was there any estoppel growing out of the commencement and trial of such suit as claimed in the second point made. *Fifield v. Edwards*, 39 Mich., 264, followed.

SWIFT ELECTRIC LIGHT CO. V. GRANT.—*Decided March 4.*—(Morse, C. J.)

Evidence—Proof of Negligence—Admissions as Evidence of Negligence—Admissibility of Evidence.—In an action for damages to a wheel alleged to have been broken through defendant's negligence, if the defendant had not been guilty of such a negligence as to render him liable for the accident, then the statement, upon his part, that he was liable would not of itself create any liability. Due care, or want of due care must be predicated upon the state of facts, and the liability of a defendant is not dependent upon what he may admit, or upon what he may deny. Statements made several days afterwards will not lessen the force of admissions of facts made at the time as evidence of how he considered the work had been done. Testimony which touches the bias or interest of a witness is always admissible.

PEOPLE V. ELLSWORTH.—*Decided March 4.*—(Morse, C. J.)

Criminal Law—Information—Conviction of Lesser Crimes under Information Charging Higher.—Where an assault, with intent to do great bodily harm, less than murder, has been made upon two persons at once and by the same act or acts, an information charging one or more persons with an assault upon two persons will be held good. (*Woodford v. People*, 62 N. Y., 117; *Fowler v. State*, 3 Heisk, 154; *State v. Bradley*, 34 Tex. 95; *Kenney v. State*, 5 R. I., 385; *Rex v. Benfield*, 2 Bur. 980; *Com. v. O'Brien*, 107 Mass. 208; *State v. McClintock*, 8 Iowa, 203; 1 Bish. Cr. Prac. §437; 2 Bish. Cr. Prac., §50.) A conviction for assault and battery can properly be had under an information charging a higher crime, including a battery. (*Hanna v. People*, 19 Mich. 315; *State v. McAvoy*, 35 N. W. R. (Iowa) 630; *State v. Welsh*, 34 N. W. R. (Iowa), 765.)

HALL V. CONCORDIA FIRE INSURANCE CO.—*Decided March 4.*—(Montgomery, J.)

Insurance—Construction of Covenants—Insurance by Mortgagee.—Covenants against over insurance are construed to relate to additional insurance affecting the interest of the assured. Plaintiff is not compelled to notify the insurance company of every additional insurance, taken out upon another interest, without plaintiff's knowledge or consent, even though there be such a covenant in the policy. (*Insurance Asso. v. Scammon*, 126 Ill. 355; *London Fire Ins. Co. v. Turnbull*, 86 Conn. 230; *Williams v. Crescence Ins. Co.*, 15 La Ann., 651.) Conditions which avoid a policy in case of others insurance are not violated by insurance effected by a mortgagee. (*Grant v. Ins. Co.*, 66 Mich., 98; *Carpenter v. Ins. Co.*, 61 Mich., 635; *Franklin Ins. Co. v. Drake*, 2 B. Mon., 47; *Savings Bank v. Ins. Co.*, 31 Conn., 518.) Failure to furnish proofs within thirty days will work a forfeiture, but will operate to suspend the right of action until proofs are furnished within a certain time. (*Kenton Ins. Co. v. Downs*, S. W. R. (Ky.), 882; *Tubbs v. Ins. Co.*, 84 Mich., 646.)

PENNINGTON, ADM'X. V. D., G. H. & M. R. R.—*Decided March 4.*—(Grant, J.)

Declaration—Variance between Allegation and Proof—When Question of Variance may be Raised—Contributory Negligence.—In an action against a railroad company for negligently causing the death of an employee, where the declaration is framed upon the theory that the cars had stopped and that they had commenced to back up on account of down grade, and the proof is that the train was moving in the opposite direction under order of the conductor, the variance between the declarations and the proofs will be fatal; a plaintiff must recover under the material allegations of his declaration. The defendant is not necessarily barred from raising the question of variance, though it was not raised in the court below.

(To the latter point Morse, C. J., and Montgomery, J., dissent, holding that objection for that reason comes too late if not raised in court below.) When the deceased knowingly entered a dangerous position, when there was no necessity or requirement for such action, he must be held to have assumed the risk and danger of the act.

WELCH V. OLMITTED.—*Decided March 4.*—(Montgomery, J.)

Infants—Action for Work and Labor Performed—Set-Off—Undue Advantage—Necessaries.—Where an action is brought by infant for work and labor performed, and undue advantage taken of infant by defendant, who induced him to accept a watch and chain in part payment, and the value of the watch was misrepresented, defendant is not entitled to off-set the claim for the watch against the demand of the plaintiff, the watch and chain being returned, where the jury find that the watch was not a necessity. (*Wood v. Losey*, 50 Mich., 475.)

JENKS V. WELLS.—*Decided, March 4.*—(Montgomery, J.)

Contract—Abandonment—Order to Drawee—Rights of Parties.—Defendant gave one Mason a contract to sink a salt well. Mason became indebted to plaintiffs, and gave them an order on defendant payable when work was done. Mason became unable to complete contract because of strike of his men and abandoned contract to defendant, who agreed to advance money for expense of completing the job, which advances Mason secured by chattel mortgage. *Held*, that if the defendant was compelled to take upon himself the burden of paying the expense of completing the contract as the only means of securing its completion, he had a right to deduct these payments from the price named in the contract, whether he gave notice to the plaintiff or not, and without reference to whether the transaction was called an abandonment or not.

MCCREARY V. MCCREARY.—*Decided March 4.*—(McGrath, J.)

Real Property—Conveyance to One Person when Consideration Paid by Another—Parol Agreement to Convey—Abandonment of Claim—A., being possessed of considerable property, wished to divide it among the three sons of his only son, B, such disposition to take effect on the death of B, or upon the performance of certain conditions. A deed of the land was given to B with the understanding that he was to convey to his sons on performance of the conditions imposed upon them. C, complainant, one of the grandsons performed his part of the consideration, but B died before deed of the portion agreed upon had been made to C. A bill is filed by C to have the land in question decreed to belong to him. *Held*, that such decree should be granted. Where the deed assumed the form it has without consent or approval of the party furnishing the consideration it is not within prohibition of the Statute. (*Eisher v. Fabes*, 22 Mich., 457; *Grasbeck v. Seeley*, 18 M., 345; *Tyler v. Pratt*, 30 M., 64; *Linsley v. Sinclair*, 24 M., 380; *Ransom v. Ransom*, 31 M., 301; *Hooker v. Oxford*, 33 M., 452.) By taking a lease from B, for the purpose of securing possession of the property before the agreed time, C will not be construed as having abandoned his claim.

BURT V. WAYNE CIRCUIT JUDGE.—*Decided, March 9.*—(Per Curiam.)

Pleas Puis Darrien Continuance—Effect of.—Under Circuit Court Rule 106, a plea *puis darrien continuance* stands simply as a notice under the general issue and requires no reply. It is therefore error to treat it as a plea requiring a replication and enter default absolute for want of reply.

HARRISON V. SPENCER.—*Decided March 11.*—(Grant, J.)

Ejectment—Application of Statute of Limitations to actions of Ejectment.—In an action of ejectment the plaintiff is under no obligations to bring his action within twenty years from the time the tax-deed, under which defendant claims, was recorded, as the statute places no limitation on actions of ejectment.

AUDITOR GENERAL V. JENKINSON.—*Decided March 11.*—(Montgomery, J.)

Taxation—Unequal Assessment—Rights of Persons Affected by Under Assessment.—When an assessing officer has purposely under-assessed certain property either by agreement with the owners of the property or his own disregard of his official duty, so that the burden of taxation rests unequally, the entire tax on the property of the persons so wronged will not be declared invalid, but they are entitled to have the amount which their taxes have been increased, in consequence of the wrongful assessment, deducted from the tax assessed against them; that is the extent of their relief. (*Walsh v. King*, 74 Mich., 354; *Merrill v. Humphrey*, 24 Mich., 170.)

EYKE V. TANGE.—*Decided March 11.*—(Per Curiam.)

Taxation—Collection of Delinquent Taxes—When mandamus Not Allowed.—Under Statute, Act No. 196, P. A. 1889, Secs. 11 and 33, providing for the assessment of shares and levying tax and collecting thereon, mandamus is not the proper remedy in proceeding by city treasurer to collect delinquent taxes, as the two remedies provided by the Statute are adequate, and are the only proper methods of procedure.

KENDRICK V. BEARD.—*Decided March 11.*—(Long, J.)

Trover—Evidence—Proof of Value.—In an action of trover for the conversion of a span of horses, evidence to prove what the horses sold for eleven months prior to the time of making demand upon defendant for them is relevant to the issue and should go to the jury for what it is worth in connection with other evidences of value. *Denton v. Smith*, 61 Mich., 433 followed. (This same case reported in 81 Mich., 182.)

PORT HURON AND NORTH WESTERN R. R. v. RICHARDS.—*Decided March 11.*—(McGrath, J.)

Railroad Aid Notes—What Constitutes Railway Station.—Defendant executed a certain promissory note payable upon the condition that the plaintiff "erect a regular station for freight and passengers upon the north side of Sec. 6, township of Lincoln, in Huron Co." *Held*, that the erection of a building 12x20 feet, not left in charge of any person; no tickets being sold from said station by any agent, and no person being stationed there to execute bills of lading for any freight to be sent from said point, is not a regular station within the meaning of the instrument upon which the plaintiff seeks to recover; consequently the note is void.

FITCH V. WALKER.—*Decided March 11.*—(Morse, Ch. J.)

Landlord and Tenant—Agreements Binding on Assignees—Instructions to Jury.—In an action for rent, when the defendant seeks to reduce the amount of plaintiff's claim by showing an agreement to reduce the rental after the first year, it is error for the trial judge to instruct the jury that to render any agreement between the parties binding, it must have been made during the first year, when there is no claim by either party or any evidence tending to show that any such agreement was made after the close of the first year's tenancy. Any agreement made by the person whose interest plaintiff acquires will be binding on the plaintiff, whether brought to his knowledge or not, and without his consent thereto.

HAINES V. BEACH.—*Decided March 11.*—(Montgomery, J.)

Declaration—Misjoinder—Damages in Trespass.—A declaration containing three counts, the first a count in trover for the conversion of personal property, the others reciting that defendants have committed trespass, in locking the door of a room which plaintiff occupied as a tenant, and thus preventing him from entering, is bad on the ground of misjoinder. A count in trover cannot be joined with a count in trespass nor with one in assumpsit. (*Friend v. Dunks*, 37 Mich., 25.) The plaintiff in such case will be entitled to damages for the interruption and loss of his business, but it is his duty to make a reasonable effort to re-establish himself in business and to reduce the loss to a minimum. (*Allison v. Chandler*, 10 Mich., 460.)

CARSON CITY SAVINGS BANK v. CARSON CITY ELEVATOR CO.—*Decided March 11.*—(Morse, C. J.)

Corporations—Elevator Companies—When Plea Ultra Vires Not Allowed.—A corporation organized, as stated in its articles of association, for the purpose of constructing, owning and controlling warehouses, and buying and selling grain and other commodities, will not be permitted to set up its want of authority to do all such acts, though its legal franchise, if tested would be confined to constructing, owning and controlling warehouses. Everyone of the stockholders knowing the object of the corporation, and having voluntarily engaged in the business, the defendant will not be permitted to plead that it had no authority under the law to do exactly what its articles of association stated to all the world was its object and purpose to do under and by virtue of its incorporation. The plea of *Ultra Vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong. (*Whitney Arms Co. v. Boston*, 63 N. Y., 62; *Day v. Spiral Spring Co.*, 57 Mich., 151; *Eureka I. & S. Works*, 60 Mich., 337; *Prairie Lodge v. Smith*, 58 Miss., 301; *Navigation Co. v. Weed*, 17 Barb., 378; *Bradley v. Ballard*, 55 Ill., 413; *Mining Co. v. National Bank*, 96 U. S., 640; *McCarty v. Lavasche*, 89 Ill., 270; 2 *Morawetz Corp.* § 693.)

RECENT DECISIONS.

ACTION ON NOTE—PLEADING COMPLAINT—INDEPENDENT PARAGRAPHS.—

Though each paragraph of a complaint must be independent, yet an allegation in one paragraph, that a note sued on was signed as stated in a prior paragraph, is immaterial, and will be treated as surplusage, where a copy of the note is filed with the complaint. In an action on a note, failure to aver that it was payable to plaintiff is immaterial where the note is made a part of the complaint. *Jaqua v. Woodbury*, (Ind. App.), 29 N. E. Rep., 573.

ASSIGNMENT OF MORTGAGE—NOTICE TO MORTGAGOR.—

The record of an assignment of a part of a mortgage is not such notice to the mortgagor as will render him liable to the assignee for subsequent payments to the assignor. *Foster v. Carson*, (Penn. App.), 23 Atl. Rep., 342.

BAILMENT—NEGLIGENCE OF BAILEE—HORSE HIRE—FORM OF ACTION.—

Hire for the use of a horse cannot be recovered in an action on the case for over-driving the horse. Where, in an action for over-driving a horse which had been let to a third person, defendant claims that he had no interest in the hiring nor control over the horse, but merely rode with the hirer on his invitation, evidence that the hirer had obtained goods by false pretenses, and that defendant knew of that fact, is so remote that its conclusion cannot be assigned as error. *Hart v. Lockwood*, (N. H. App.), 23 Atl. Rep., 367.

CANCELLING DEED—UNDUE INFLUENCE—CONFIDENTIAL RELATION.—

A Roman Catholic woman, old, eccentric and illiterate, devised certain land to her spiritual adviser, a priest. She afterwards revoked the will, and by deed, reserving to herself a life estate, conveyed the land as a gift to the priest. *Held*, that the burden was on the priest to prove that his grantor was fully apprised of the legal effect of her act when she signed the deed, and that she was not influenced by her confidential relations with him, and because of the failure of such proof the conveyance must be set aside, and the money paid by the priest refunded. *Corrigan v. Pironi*, (N. J. App.), 23 Atl. Rep., 355.

CEMETERIES—POWERS OF OFFICERS LIMITING INTERMENTS—INJUNCTION—

PARTIES.—The acts of defendants, entrusted with enforcing rules and regulations of an association, do not bind them so as to prevent them from recognizing changes that may have taken place since the title deeds were issued to lots in its cemetery. They have the right to limit all interments in lots to the members of the family owning lots, and their relatives. *Farely v. Metairie Cemetery Ass'n*, (Louisiana App.), 10 Southern Rep., 386.

CHAMPERTY—EFFECT ON RIGHT OF ACTION.—

While a champertous agreement between a plaintiff and his attorney for the prosecution of a certain suit is against public policy and void, it does not affect the right of the plaintiff to prosecute his action against the defendant in the suit for the prosecution of which the champertous agreement was made. *Penn. Co. v. Lombardo*, (Ohio App.), 29 N. E. Rep., 573.

CONSTITUTIONAL LAW—EX POST FACTO LAWS—HABITUAL CRIMINALS.—

St. 1887, c. 435, provides that "whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms or not less than three years each, shall, upon conviction of a felony committed in this state after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state-prison for twenty-five years," etc. *Held*, that the statute is not retrospective, nor ex post facto since a criminal cannot be punished under it without conviction of a felony committed after its passage, and with a presumed knowledge of the statute.—*Commonwealth v. Graves*, (Mass. App.) 29 N. E. Rep. 579.

CONSTRUCTION OF WILL—NATURE OF ESTATE.—

Under a will devising land to one "to have and to hold, to him and his heirs, forever," and afterwards provid-

ing that the devisee may sell the same to his brother, and that, in case of his failing so to sell it, the land shall go to others after his death, the devisee takes a fee-simple title. *Rea v. Bell*. (Penn. App.), 23 Atl. Rep., 349.

CORPORATIONS—LIABILITIES TO STOCKHOLDERS—TRANSFER OF STOCK BY WIFE.—The rights and duties of both the stockholders and the corporation whose stock they hold grow out of a contract implied in a subscription for stock. A married woman, who owns shares in a corporation, is not relieved from all losses caused by her acts. *Nat. Bank of New Orleans*, (Louisiana App.), 10 Southern Rep., 379.

CORPORATIONS—POWERS OF DIRECTORS—SALE OF LAND—PURCHASE BY DIRECTOR.—The board of directors of a corporation has the undoubted right to sell property of corporation to pay its debts. When the board of directors who sold the property made the sale necessary by its mismanagement, one of the directors on said board will not be permitted to purchase the property. *Crescent City Brewing Co. v. Flanner*, (Louisiana App.), 10 Southern Rep., 384.

DEED OF GIFT—DELIVERY TO MINOR—ACCEPTANCE—ADVANCEMENT.—In a proceeding to charge a daughter with the value of a slave as an advancement, it appeared that in 1859, her father made to her a deed of gift for a slave girl; that the daughter lived with her father until her marriage, ten years thereafter; that the slave lived in his household until she voluntarily left, after the close of the civil war; that the deed was signed by her father, and attested by three witnesses, and a few days thereafter personally acknowledged by him and caused to be registered; that the daughter had no trustee or guardian other than her father. *Held*, that this constituted a delivery of the slave to the daughter. Where the father directed the registration of the deed, this would amount to a *prima facie* delivery to it. The subsequent emancipating of the slave does not affect the gift as an advancement to the daughter. *Davis v. Garrett*. (Tenn. App.), 18 S. W. Rep., 113.

DIVORCE—PRACTICING CHRISTIAN SCIENCE.—In an action for divorce by husband on ground of injury to mind and endangering of reason caused by defendant's believing in and practicing the faith of Christian Science against his wishes, *held*, that he was entitled to divorce, although it was shown that she was a true and loving wife and mother. The test in this case was not whether the treatment complained of could reasonably cause such injuries, but whether or not it did cause such injuries, and is purely a question of fact. *Robinson v. Robinson*. (N. H. App.), 23 Atl. Rep., 362.

EMINENT DONAIN—OPENING A STREET ACROSS RAILWAY.—Where a grant is given by the city of Kokomo, Ind., to locate a street, which crossed a railway. The court *held*, that a right to cross existing public ways as canals, railroads, turnpikes, etc., was impliedly conferred with the authority given to construct the street. *Railway v. City of Kokomo, Ind.*, 29 N. E., 780.

EXECUTION SALE—CONSTABLE'S FEES.—Where an execution is levied on personal property, a charge by the constable for storage cannot be allowed as part of the expense for serving the execution, but should be presented as an additional return on the writ, to be taxed in the cost of suit and included in the judgment. In the absence of a statute allowing it, a constable cannot charge for preparing advertisements for the auction sale, making schedules of the property, conducting the sale, nor of a flag used at such auction. *C. B. Rogers & Co. Corp. v. Simmons*. (Mass. App.), 29 N. E. Rep. 580.

HUSBAND AND WIFE—BANK DEPOSITS IN WIFE'S NAME.—Where money deposited in a savings bank in the name of a married woman is claimed by her husband after her death as his property, evidence that at different times she had to save it for him, is insufficient to rebut the presumption that the money belonged to the wife. *Qualters v. Maloy*. (Penn. App.), 23 Atl. Rep., 348.

IMPUTED NEGLIGENCE—MASTER AND SERVANT—LAW OF THE ROAD.—Where one hires a hack to convey him to and from a funeral, and the hack is driven by a hackman who is employed by the owner, and is not controlled by the passenger, the negligence of the hackman is not imputable to the passenger, since the hackman is not his servant; and, in an action for damages caused by a collision between vehicles, it is proper to instruct the jury that the fact that defendant's vehicle was on the wrong side of the road is evidence of negligence, though not conclusive. *Randolph v. O'Riorden*, (Mass. App.), 29 N. E. Rep., 583.

INFRINGEMENT OF PATENT—JURISDICTION—SUIT AGAINST A FEDERAL OFFICER.—Two patents were duly issued by the government and an officer, of the United States army, is charged with the infringement of them. The defendant admitted that he had superintended the making of breech-loading fire-arms at the Springfield armory, but alleges that all his acts were done in obedience to orders from the Secretary of War and his other superior officers. *Held*, that the rights secured to a patentee under his grant from the government are a form of property, in the enjoyment of which he is entitled to protection against all trespassers, including the government and that an officer of the United States may be held liable for such infringement. *Head v. Porter*, (Mass.), 48 Fed. Rep., 481.

INJURY TO EMPLOYE—ASSUMPTION OF RISK—DANGEROUS APPLIANCES.—Where an experienced switchman, having charge of the engine and its movements, undertook, without objection, to couple a flat-car, with its load projecting over the end, to a flat-car, knowing the dangerous way in which it was loaded, he assumed the risk of the undertaking. Where a railroad company receives loaded cars from another company, it is not liable for a failure to inspect such cars, and have them properly loaded. *Mexican Cent. Ry. Co. v. Shean*, (Texas App.), 18 S. W. Rep., 151.

INTERSTATE COMMERCE—VALIDITY OF CITY ORDINANCE.—An ordinance passed by the city council of the city of Chicago, providing, that all owners of tugs, steam-barges, etc., should first obtain a license from the city authorities before they be allowed the use of Chicago River, which was *dredged* and made navigable at the expense of the city of Chicago, was *held*, not to be a regulation of interstate commerce in an action by the city of Chicago against the owners of steam-tugs whose tugs were regularly licensed for coasting trade, by the United States authorities; they being engaged in interstate and foreign commerce on Lake Michigan. *Harmon v. City of Chicago*, (Ill.), 29 N. E., 732.

MORTGAGE—FORECLOSURE—REDEMPTION—EQUITY PRACTICE—DISMISSING BILL.—Where, on foreclosure of a senior mortgage, the mortgaged property is bid in by senior mortgagee for less than the mortgage debt, a statutory redemption by a junior mortgagee gives such junior mortgagee a first lien on the land, regardless of the balance still due the senior mortgagee, since by the foreclosure the lien of the senior mortgagee is extinguished. *Seligman v. Laubheimer* 58 Ill. 124, followed. Rev. St. c. 22 p. 36, which provides that no complainant, after a cross-bill has been filed, may dismiss his bill without defendant's consent, does not prevent a complainant from dismissing his bill without defendant's consent after the cross-bill has been dismissed on demurrer. *Ogle v. Körner*, (Ill. App.), 29 N. E. Rep., 562.

NEGLIGENCE—INJURIES FROM FRIGHT.—A complainant alleging that in a collision of defendant's railroad, the cars were thrown off the track and fell on plaintiffs premises and against her dwelling, whereby plaintiff was subjected to great fright, nervous excitement and distress, and her life endangered, states no cause of action. *Ewing v. Pittsburgh, C. C. & St. L. Ry. Co.*, (Penn. App.), 23 Atl. Rep., 340.

NEGLIGENCE—INJURY TO PASSENGER—BURDEN OF PROOF.—A passenger on a railroad train, which had stopped at a station, placed his hand on the jam of the car door. It was injured by the company's brakeman entering the car and closing the door. *Held*, in an action for such injury, that the passenger's negligence precluded his recovery. The burden was on plaintiff to show negligence on the part of such brakeman, and, failing to show this, the evidence would not support a verdict for him. *Texas & P. Ry. Co. v. Overall*, (Texas App.), 18 S. W. Rep., 142.

PLEADING—USURY.—An answer in an action on a note, which alleges usury, and asks that the defendant be allowed to recoup the interest he has paid on the note, but does not state how much of the note was usurious, nor the amount of the interest the defendant claims to recoup, nor the particulars of the contract on which the usurious interest was included in the note, nor the quantum of usurious interest that was agreed to be paid in, is bad. A plea of usury in bar of an action on a note, where usury under the statute does not render the note void, is bad. *Lockwood v. Woods*, (Ind. App.), 29 N. E. Rep., 569.

STATUTE OF FRAUDS—DAMAGES FOR BREACH OF CONTRACT—AUCTION SALE.—An auctioneer at a public auction, immediately after selling land to defendant, signed the following: "365 acres, at \$20 per acre, to Capt. McBryer. I certify the above is correct. Oct. 10, 1888. T. D. ENGLISH." *Held*, a sufficient memorandum in writing to support a suit against defendant. Where a purchaser of land at public

auction, repudiates his bid, and necessitates a resale, the measure of damages in a suit against him by the vendor is the excess of his bid over the price at which the land sold, together with the expense of the resale. *McBrayer v. Coren*, (Ky. App.) 18 S. W. Rep., 128.

WILLS—CHARITABLE BEQUESTS.—In a will which gave to the executors, as executors, power of sale of the testators' realty, with the direction to the executors, as trustees, to pay and deliver the sum of \$5,000, each, to the Wisconsin Female College, the Ripon College, and the Beloit College for common charitable use, and directing that the residue of the estate be delivered to an institution of learning to be organized at Beaver Dam for like charitable use, *it is held*, that the bequests are of personalty only that the rule against perpetuities does not, therefore, apply, and that the bequest is not void, for uncertainty of the beneficiaries. *Dodge v. William*, (Wis.), 50 N. W. Rep., 403.

WIFE'S SEPARATE ESTATE—ADMISSIONS BY HUSBAND.—In an action to establish a lost deed conveying certain property to plaintiff's grantor, plaintiff, introduced evidence that a deed had been executed as alleged. In rebuttal, defendants offered a letter from husband of plaintiff's grantor to one of defendants. The letter was, in substance, an admission by the writer of the addresser's interest in the property. *Held*, inadmissible, as no admission of the husband can affect the wife's separate estate. *Clapp v. Engledon*, (Tex. App.), 18 S. W. Rep., 146.

MICHIGAN LAW JOURNAL.

VOL. I.

MAY, 1892.

No. 4.

LIMITING THE LIABILITY OF COMMON CARRIERS IN TRANSPORTING GOODS AND LIVE STOCK.

HON. ALBERT H. HORTON.

Common carriers are public agencies of commerce and transit, and therefore the liabilities of such agencies in the transportation of goods or live stock are of great practical importance. Steamships, steamboats, railroad companies, express companies, stage lines, wagoners, teamsters, and others, who carry goods for hire from country to country, state to state, city to city, or from one place to another, transport so many goods and so much live stock that the law relating thereto touches directly innumerable people and multiplied interests. The law excuses common carriers, where the loss has been caused by inevitable accident, sometimes called the act of God or the public enemy, in the absence of a special contract assuming such dangers. The law goes farther. If the owner of goods or live stock, by his own imprudence brings the loss upon himself, the consequences of his fraud and folly fall upon him, not upon the carrier. Again, carriers are exonerated from liability for loss, resulting from the inherent vice of the goods, and in the transportation of live stock, they are not insurers against injury arising from the uncontrollable, vicious propensities or habits of the animals themselves.* Carriers may, by special contracts, limit their common law liability in certain cases, which it is the purpose of this brief article to designate. According to the generally recognized rule, they cannot stipulate for exemption from the consequences of their own negligence, or that of their servants.

It was said by the late Mr. Justice Bradley, the eminent scholar, lawyer, and jurist, that "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents, often, indeed, with-

* *Railroad Company vs. Nichols*, 9 Kas., 235; *Hutchinson on Carriers*, Sec. 221; *Railway Co., vs. Wynn*, 88 Tenn., 320.

out knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. * * * If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness." *

Exemption as Insurers. The common law liability of carriers as insurers for injuries, occasioned by accident or mistake and without their fault, may be relieved against by special contract or acceptance. This right of carriers to thus limit their liability is now supported by the authorities of this country. The decisions differ, however, whether carriers can limit their liability by a general notice. Many of the courts holding that the relief must be by an express or special contract. †

Limiting Liability for Losses. The authorities, which are clearly sustained by reason, hold that common carriers may, by contracting with the shipper, fix an agreed valuation upon goods or stock transported, beyond which the carrier is not to be liable in case of loss. To allow a shipper to value his goods for the purposes of express or freight charges at one price, and then when they are lost, to recover two or three times his own agreed value, is a direct premium on fraud, such as no court ought to sanction.

The Supreme Court of the United States recently said: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intend he should assume." ‡

* Railroad Co. vs. Lockwood, 84 U. S., 367; Hart vs. Railroad Co., 112 U. S., 231; Express Co. vs. Foley, 46 Kas., 457.

† Steam Navigation Co. vs. Merchants' Bank, 47 U. S., 344; Barter vs. Wheeler, 49 N. H., 9; Kallman vs. Express Co., 3 Kas., 206; Moulton vs. Railway Co., 31 Minn., 86. As to the rule in various states, see Lawson on Carriers, 24-57.

‡ Hart vs. Pennsylvania Railroad, 112 U. S., 321; Graves vs. Railroad Co., 137 Mass. 33; Harvey vs. Railroad Co., 74 Mo., 539; Railroad Co. vs. Sherwood, 58 Ala., 178.

Limitations to pay compensation for the carriage of goods or property proportioned to their value are generally found in the receipts of express companies; often, however in those of other carriers. When an express company or other carrier, gives a printed receipt, valuing a package or an article received for transportation at \$50, or any other stated sum, and limiting the liability for loss to that amount, unless the value is otherwise therein expressed, and the receipt is accepted by the shipper, a valid agreement is concluded as to the extent of the company's or carrier's liability, if loss occurs.

The New Hampshire Supreme Court in 1890, and the Kansas Court in 1891—the East and the West—very fully examined the limitation of the liability of express companies and other carriers upon written receipts of the character referred to, and in both states it was ruled that shippers receiving such receipts without objection, in the absence of fraud, must be conclusively presumed to have assented to the terms and conditions thereof, and that the responsibility imposed on the carriers by the common law was restricted to the value stated in the receipts. In these cases, the decisions *pro* and *con* are cited at great length.* If the agreed valuation in a special contract, signed by both parties, as the basis of the carrier's charges and responsibility, be admitted as valid, it logically follows in the absence of fraud, concealment or improper practice, that the stipulations limiting the common law liability of an express company or other carrier contained in the receipt, given and accepted in good faith, are also valid.

The more recent decision of the Rhode Island Court is an exhaustive review of the same question and supports the same conclusions.†

That court says: "Such an agreement certainly strikes one as eminently fair and reasonable. Neither party is deceived or misled. The shipper on the one hand is insured of the safe delivery of his goods at their destination, or their value in money, in case of loss, and the carrier, on the other hand, proportions his care to the liability, which he has assumed. Both parties thus act understandingly and intelligently. There is little opportunity for fraud on the part of the shipper, and none for overcharge on the part of the carrier."

The illustrations in the Rhode Island case strongly present the fairness of treating such receipts or contracts as conclusive and binding. There are many decisions to the contrary.‡

The Supreme Court of Tennessee has said: "To our minds it is perfectly clear that the two kinds of stipulation, that providing for total, and that providing for partial exemption from liability for the consequences of the carrier's negligence, stand upon the same ground, and must be

* *Duntley vs. B. & M. R. Co.*, (N. H. 1890) 20 Alt. Rep., 327; *Durgan vs. Express Co.*, (N. H. 1890) 20 Alt. Rep., 328; *Express vs. Foley*, 46 Kas., 457.

† *Ballou vs. Earle* (S. C. of Rhode Island) 22 Atl. Rep., 1113.

‡ *Railway Co. vs. Wynn*, 88 Tenn., 320; *Farhnam vs. Railroad Co.* 55 Pa., St., 53; *Grogan vs. Express Co.* 114 Pa. St., 523; *Express Co. vs. Seide*, 67 Miss., 609; *Moulton vs. Railway Co.* 31 Minn., 85; *Express Co. vs. Harris*, 120 Ind., 73; *Railway Co. vs. Harris*, 67 Texas, 163, and the cases there cited.

tested by the same principles. If one can be enforced the other can, if either be invalid, both must be held to be so, the same considerations of public policy operating in each case."

The courts holding that such a contract is not valid, say that its effect is to exempt a carrier from liability for negligence. This is not correct. "The limitation as to value has no tendency to exempt from liability for negligence." Carriers are bound to receive and transport the property of the shipper, but every carrier has the right to make reasonable rates for carriage. Carriers cannot arbitrarily fix any valuation on property received, but may insist on reasonable information of value in order to determine the extent of the risk, the care necessary and the rates to be charged. Therefore, when the shipper places his own valuation upon the property delivered to the carrier and the carrier makes his charges accordingly, there is no justice in allowing him to be paid a larger value for his property, if loss occurs. The conclusion stated by the Tennessee court, that a total exemption from liability and a partial exemption, stand upon one and the same ground, is wholly unsound. A total exemption of all liability would be against public policy, but the payment of a loss, to be determined by an agreed valuation on the goods or article conveyed, is not against public policy, but permits the fair enforcement of a contract, just and reasonable to both parties. It gives the shipper, in case of loss the value agreed upon—his own value. It enables the carrier to understand the risk and liability he has assumed and to fix a charge in proportion therewith and to pay, in case of loss, accordingly.*

Notice for Damages in Writing. Carriers may stipulate by special contract that as a condition precedent to the shipper's right to recover damages for any loss or injury to live stock while in transit, he must give notice in writing of his claim to some convenient officer of the carrier before the stock is removed from the place of destination or delivery and before it is mingled with other stock. As a general rule, the owner or his agent accompanies the stock while in transit and such notice can be readily given. The notice is for the protection of the carrier from fraud and imposition in the adjustment of claims by giving him a reasonable opportunity to ascertain the nature of the damage alleged and its cause. After such property has been taken from its place and mingled with other property of like kind, the difficulty of inquiring into the circumstances and character of the injury is greatly increased.† Such provisions are to receive a reasonable interpretation and a substantial compliance with a special contract on the part of the shipper is sufficient. The circumstances of each case must determine how promptly notice must be given and whether that which is given is reasonable, considering the purposes for

* *Express Co. vs. Foley*, 46 Kas., 457; *Boorman vs. Express Co.*, 21 Wisconsin, 152; *Durgin vs. Express Co.* 20 Atl. Rep., 328; *Squires vs. Railroad Co.* 98 Mass., 293.

† *Goggin vs. Railroad Co.*, 12 Kas., 416; *Sprague vs. Railroad Co.*, 34 Kas., 347; *Railroad Co. vs. Dill*, Kas. S. C., Feb. 5th, 1892, MSS. *Express Co. vs. Caldwell*, 88 U. S., 264; *Rice vs. Railroad Co.*, 63 Mo., 314.

which such contracts are made. In some cases the notice must be given immediately to be of any value. Carriers may also limit the time within which claims may be presented by the owner of goods or stock in case of loss. The object of such a stipulation is to enable the carrier while the occurrence is recent, to ascertain what the facts are, but the owner having made his claim may delay his action for recovery to any time within the period limited by the law. "There is great hardship in permitting the carrier to account for property long after its delivery, or its time for delivery, when he has had no notice of any failure of duty on his part, and when the lapse of time makes it difficult to ascertain the actual condition."

The limitations referred to have been restricted by the statutes of some of the states, but the prescribed limitation of this article forbids any comment upon special or local legislation. General rules or principles only have been commented upon.

In conclusion, it may be stated that all of the decisions are to the effect that common carriers cannot limit their common law liability by special contracts with shippers, unless they are reasonable and fairly made and that they cannot exact, as a condition precedent for receiving or carrying goods or stock, the signing by the shipper of a contract in writing limiting or changing the common law liability. If carriers have two rates or charges for carrying goods or live stock, one for carrying under the common law liability, and another for carrying under special contracts, shippers must always have real freedom of choice in making their selections.*

* *Railroad vs. Temple* (Kas. S. C.) 27 Pac. Rep., 83; *Goggin vs. Railroad*, 12 Kas., 416; *Wichita E'y Co. vs. Koch*, 28 Pac. Rep., 1013; *Railroad vs. Lockwood*, 84 U. S. 357; *Railroad vs. Simpson*, 30 Kas. 645; *Railroad Co. vs. Dill*, Kas., S. C., Feb. 5th, 1892, MSS.

RESIDENCE OF CORPORATIONS FOR TAXATION PURPOSES.

THE DETROIT TRANSPORTATION COMPANY V. THE BOARD OF ASSESSORS OF THE CITY OF DETROIT.

Michigan Supreme Court, April 15, 1892.

1. A corporation possesses the same right to select or change its residence, with a view to taxation, that an individual does; but it must have a local habitation, and cannot fix a nominal domicile in the country while its actual domicile for business is in the city.

2. Though the residence as stated in the articles of association is usually conclusive, and will estop the corporation from claiming that that is not its residence for certain purposes, such as filing chattel mortgages and service of process, yet if it is apparent that the sole purpose is to avoid taxation, and that no office for business within the meaning of the law is kept at the place mentioned in its articles, the municipality where its real office is kept may assess and tax its personal property.

Petition for writ of mandamus to compel the respondent to remove relator's name from the assessment roll. Full statement of the case given in decision.

Wells, Angell, Boynton & McMillan, also *Gray & Gray* and *F. H. Canfield*, for relator.

F. A. Baker, for respondent.

PER CURIAM: The petition in this case sets forth that the relator is a Michigan corporation organized under "An Act to authorize the formation of corporations for the purpose of engaging in commerce or navigation" and acts amendatory thereof; that its articles of association are duly filed and recorded; that its general office for business is located in the township of Hamtramck; that its amended articles of association contain the following: "The office for the transaction of the business of said corporation shall be in the township of Hamtramck, in the county of Wayne, and State of Michigan"; that it owns four vessels engaged in the transportation of iron ore, chiefly to the ports of Lake Erie, but that occasionally cargoes of iron ore have been carried to the ports of Detroit and Wyandotte; that in February, 1892, it entered into a contract at Cleveland, Ohio, with parties residing there, for the employment of its vessels in transporting ores during the entire season of 1892 between ports of Lake Superior and Lake Erie; that it hires and maintains a general office for business in this township of Hamtramck, which place bears the sign of petitioner, and that all of its stockholders' and directors' meetings are held at said office; that it has no general office for the transaction of business or other office whatsoever in the city of Detroit, and that no sign of petitioner is

exhibited anywhere in said city; that the business of securing cargoes for the current year will be transacted by its agents in the Lake Erie ports; that cargoes for prior years have been secured in the same way; that its agents are paid commissions for their services; that moneys earned are, as a rule, collected at the several places where they become due; that it has no property in the city of Detroit; that its books of account are kept at the general offices of the Michigan Car Company, in the city of Detroit; that petitioner is charged a nominal sum per year on account of the expenses of said book-keeping; that its earnings are paid to William K. Anderson, of Detroit, who is its treasurer, and who pays its bills, and accounts to it at its annual meeting in the township of Hamtramck; that it was taxed in the years 1890 and 1891 in the township of Hamtramck upon the value of its vessels; that its manager resides in Detroit, but has no office therein as such manager; that his business consists in keeping its vessels running and in repair, and is nearly all transacted elsewhere; that respondent has placed its property upon the assessment rolls of the city of Detroit for the purpose of taxation; and prays for the writ of mandamus to compel the respondent to remove its name from the assessment roll.

The respondent admits the due incorporation of relator, and the statement as to the location of its office in its articles of association. It alleges that the original and the first amended articles of association of relator declared the general office for transaction of its business to be located in the city of Detroit; that the amendment changing such office to Hamtramck was not made in good faith and is not true in point of fact; that its general office for the transaction of its business has always been and still is in the city of Detroit; that prior to 1891 relator pretended to have an office on Jefferson Avenue in the township of Hamtramck, at the residence and place of business of one Vorhees, a few rods from the margin of the Detroit River; that said Vorhees kept a place commonly known as a road-house, frequented by gentlemen who go out riding and desire to stop at a place where their horses may properly be taken care of; that said Vorhees is a trainer and driver of trotting horses; that on one end of the stoop of said Vorhees the relator has a small tin sign with its corporate name marked thereon; that relator never did any business there as a corporation; that its officers and managers did no corporate business there except possibly the stockholders met there or pretended to meet there for the election of officers; that respondent is informed that the stockholders of relator never met at said road-house in a corporate meeting, but have upon some occasions ridden by said road-house in a street car and held their meeting in a street car while traveling through that part of the township of Hamtramck; that in 1891 the Legislature enlarged the corporate limits of the city of Detroit by adding to it all that part of the township of Hamtramck lying between the city of Detroit and the township of Grosse Pointe, and certain other territory; that by this Act the whole of said Jefferson Avenue upon which said road-house was located

became one of the streets of the city, and all the river property situated in said township became a part of the city; that all that is left of the township of Hamtramck is a tract of country lying east of Woodward Avenue and north of the city of Detroit, in which there is no river property and no navigable water, and is wholly occupied by farms and gardens; that relator has removed the sign from said road-house and taken it to a farm house owned by David Whitney, and situated on Chene Street in the present township of Hamtramck, and pretends to have its office there; that said company has never done any corporate business at said farm house and in the nature of things can do no business there; that all its stockholders are residents of Detroit and do business in the city; that all the officers and agents reside and do business in the city; that the books of said company are kept in the city; that it receives and pays out its money in the city; that respondent is not informed whether its stockholders have ever met at said farm house, but that aside from a meeting of the stockholders all its business is transacted in the city; that James W. Millen, of the firm of Parker & Millen, of the city, is its general manager and chief executive officer; that they have an office at 15 Atwater Street in the Second Ward of the city, with a frontage on Detroit River, a telegraph office, and all conveniences necessary for the transaction of any business connected with the navigation and commerce of the Great Lakes; that its vessels are enrolled under the laws of the United States in the Custom House in the city of Detroit; avers that the principal office of relator within the meaning of the law is located in the city of Detroit; that its vessels are taxable there, and insists that a writ of mandamus is not the appropriate remedy for relief against the assessment.

On account of the necessity of an immediate disposition of the question for the interests of the public, we are disposed to waive the objection that the writ of mandamus is not the proper remedy, and dispose of the case upon its merits.

The Act under which relator is organized provides that the articles of association shall state "the city or town or county in this State where, their office for business is located."

Section 4, of the Tax Law of 1891, provides, "All corporate property except where some other provision is made by law, shall be assessed to the corporation as to a natural person in the name of the corporation. The place where its principal office in this State is situated shall be deemed its residence."

The relator claims that the location of its office is a question of law, and that the articles of association are conclusive upon this point, and that as a matter of fact it has no other office than the one in Hamtramck. In support of this view we are cited to: *Western Transportation Company v. Scheu*, 19 N. Y., 408; *Oswego Starch Factory v. Dolloway*, 21 N. Y., 449; *Union Steamboat Company v. Buffalo*, 82 N. Y. 351; *Pelton v. Transportation Company*, 37 Ohio St., 450.

In *Western Transportation Company, vs. Scheu*, the tax law of New York provided that "all the personal estate of every incorporated company, liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be."

The act under which the plaintiff in that case was organized provided that a certificate should be filed in the office of the clerk of the county in which the principal office for the management of the business of the company should be situated, and that it should state "the name of the city or town, and county, in which the principal office for managing the affairs of such company is to be situated," and should also keep its stock-book at the place designated in the certificate.

The articles of association in that case fixed the office of the corporation at the village of Tonawanda, where the stock-book of the company was kept and the directors held regular monthly meetings, and one clerk was employed and kept at the office, while an office was maintained in Buffalo, at which the president, secretary and treasurer of the company chiefly did their business. It will readily be seen that the facts in that case and the statute are different from those in the present case.

In *Oswego Starch Factory v. Dolloway*, the plaintiff was a manufacturing corporation with its manufacturing establishment located and its business carried on in the city of Oswego. The books were kept at the treasurer's office at Auburn and its general financial affairs were transacted there. The certificate was required to state "the names of the town and county in which the operations of the company are to be carried on." The tax law provided, "All the personal estate of every incorporated company, liable to assessment on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be; but if such company have no principal office or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on."

It was also said in this case that the certificate under which the plaintiff was organized "was intended to serve the same purpose as the declaration usually contained in special acts of incorporation, in which it was stated that the business was to be carried on in a particular town or city. The location established by the certificate could not be changed at the pleasure of the directors or trustees any more than the corporate name, the period of existence, or the objects for which the company was formed or the amount of the capital stock."

The plaintiff was taxed in Oswego and the assessment there was sustained, notwithstanding that its principal office for the transaction of its financial concerns was in Auburn. A distinction is drawn in that case between manufacturing corporations and transportation companies whose business could not generally be carried on in a single local jurisdiction.

These cases are distinguishable in their facts as well as in the statute governing them, from the present case.

It must be conceded that *Union Steamboat Company v. Buffalo*, goes to the full extent in the claim of the relator in this case.

In the case of *Pelton v. Transportation Company*, the statute of Ohio differs from ours in that it does not require the articles of association to state that the principal office of the company to be designated is its office "for business." In that case the office was located at the residence of the vice-president of the company, who was its specially authorized agent. In other respects it does not differ in its facts from the present case.

It is undoubtedly true that one may select or change his residence with a view to taxation. The citizen has the right to reside in the country and do business in the city. This, however, must be an actual residence. One cannot maintain a nominal residence in the country while his actual residence is in the city, and thus avoid taxation in the city. A corporation possesses the same right in this respect that the individual does. A corporation must have a local habitation; It cannot fix a domicile in the country while its actual domicile for business is in the city. If the relator's position is correct, it could as well locate its office for business at a farm house in some town in the interior of the state as well as in Hamtramck. It has no business in Hamtramck, and in the very nature of things can have none. None of its property is situated there. The term "for business" used in the statute cannot be limited to so narrow a construction as to say that it means simply the annual meeting of the stockholders or a meeting of directors. It must be held that the legislature used the term in its ordinary significance and intended it to refer to the business in which the corporation was engaged.

This is a Michigan corporation. Its local existence must be held to be in some place in the State where its business is carried on. In so far as the authorities above cited hold that the statement in the articles of association is conclusive against the State for the purposes of taxation, we cannot follow them. The result would be to permit a corporation to have a merely nominal residence in one place, while its actual residence is in another, and thus give to them a privilege which is denied to individual citizens.

For the purposes of this case the answer must be taken as true, and from that it appears that the only office for business which the relator has in this State, is in the city of Detroit. The statement in its articles of association will undoubtedly stop relator to say that that is not its residence for certain purposes, such as filing chattel mortgage and service of process; but, where it is apparent that the sole purpose is to avoid taxation, and that no office for business within the meaning of the law is kept at the place mentioned in its articles, the municipality where its real office is kept may assess and tax its personal property.

The writ must be denied.

NOTE.—It is admitted that upon general principles one may select his residence; that residence is largely a question of intention, and that one's acts and declarations are the best evidence of intention. This is true where the settlement of a pauper, or the succession to property, or the exercise of political privileges is involved; but on a question of taxation other considerations arise. The suburbs or Boston have occasioned some interesting examples.

In *Wright v. City of Boston*, 126 Mass., 161, plaintiff brought an action against the city to recover taxes paid under protest, and which had been assessed against him as a resident of Brookline. He claimed to be a resident of Nahant. On the issue as to his residence the court held: "His declarations as to his residence in a letter by him to the assessors of the city; deeds in which he was grantor, describing him as 'of Nahant,' one of which was to the city as grantee; his will, in which he was described as in the deeds; and the will of his father in which he was so described, are all inadmissible in his favor," on the ground that a person cannot by his declarations locate the place of taxation. See also on nominal residences as affecting taxation: *Weid v. Boston*, 126 Mass., 166; *Borland v. Boston*, 132 Mass., 89; *Pickering v. Cambridge*, 144 Mass., 244; *Douglas v. New York*, 2 Duer, 110.

One may change his residence for the express purpose of avoiding taxation. *Draper v. Hatfield*, 124 Mass., 53. But a mere colorable change of residence for such purpose will not be regarded. *Cooley on Tax*, 371, *note*; *Meserve v. Folsom*, 62 Vt., 504; *King v. Parker*, 73 Iowa, 757. In *Douglas v. New York*, *supra*, the plaintiff attempted to build up an artificial residence outside of New York to escape taxation; as a result he paid in one year upon the same property taxes to two distinct municipalities. The courts gave him no relief.

In *Meserve v. Folsom*, *supra*, Powers, J. said: "Though it is true that a tax assessment is a proceeding in invitum, and the law which operates to take from a citizen his property for public purposes is to be strictly construed, nevertheless a taxpayer is under a duty in, view of the protection afforded him by the law, to contribute his just proportion to support the government under which he lives, and the question of his liability to taxation in a given locality is to be tried in the light of this fact."

In *Pickering v. Cambridge*, *supra*, plaintiff claimed to reside at Greenwich, and a strong case by his acts and declarations was presented to the court, but it was purely artificial for the general purposes of life was at Cambridge. Field, J., said: "The fact of domicile is shown by acts of residence with the intention of making the place of residence a home. A man cannot elect to make one place his home for the general purposes of life, and another place his home for the purpose of taxation. So far as the right or the liability to be taxed depends upon domicile, it is an incident of domicile. The controlling reason why a man changes his domicile may be in order to avoid taxation in the place where he was domiciled, but to accomplish this he must actually change the place of his home. He cannot elect to be taxed in one place rather than another, except by living in the place and making it the place of his principal residence."

J. C. Knowlton.

FORGERY BY ERASURE.

BY M. D. EWELL, M. D.

Erasures on written documents with fraudulent intent are usually committed in one of two ways, either by mechanical means, such as the use of a rubber or a knife, or by means of the application of some chemical re-agent.

Erasures by mechanical means always remove a portion of the surface of the paper, thereby destroying the polish of the surface, called "mill-finish." By this sort of erasure a portion of the substance of the paper is removed, thereby making the paper thinner at the spot treated. An attempt is usually made thereafter to restore the polish by means of rubbing or the application of some sort of size followed by rubbing, but in my experience it is always easy to expose forgeries of this sort, it being impossible by any means whatever short of a re-manufacture of the paper to restore paper at the point thus treated to its original condition. Sometimes where the erasure is not complete it is possible to make out a portion of the writing removed; and even if this is not possible the treatment of the paper, as already stated, is quite apparent.

Chemical erasures are usually made by the use of either oxalic acid or chlorine. In cases of this sort the liquid applied will always remove the "mill-finish" of the paper but does not render the paper thinner, and in my experience it is in this instance as in the former, always impossible to restore the mill-finish so as to obliterate the traces left by the application of the liquid. In a majority of instances the chemical applied has the effect simply to render the chemical constituents of the ink invisible without removing them from the substance of the paper; and when this is the case the application of an appropriate re-agent will always restore the writing to legibility in whole or in part, and oftentimes it will be quite as legible after such restoration as before the application of the obliterating re-agent. If it should happen, which is improbable, that the application of the removing agent is so thorough and complete as to prevent the restoration of the writing to legibility, it is always possible to show beyond controversy that the spot upon which the writing originally has been chemically treated, and to make this distinctly apparent by color contrast with the other portions of the document.

It will appear from the above that it is impossible for a forger, however skillful, so to remove written words from paper, whether by mechan-

ical or chemical means as not to leave upon the paper clear evidence of his fraudulent attempt.

In the preparation of documents where it is probable that an attempt will be made to commit the crime of forgery, as for instance in the case of railway tickets by erasure of the name of the purchaser and insertion of another name, it is possible so to prepare the paper by chemical treatment, or so to prepare the ink with which the written blanks are filled, that the application of a chemical re-agent for the purpose of erasing the written portion will so change the general color of that portion of the paper as to defeat the attempt and destroy the ticket by making it apparent on the most superficial examination that it has been chemically treated.

The question of chemical erasure of writing arose recently in an important case at Duluth, Minn., known as the "Section 30 case;" but as the case is still pending and undetermined it would be improper at this time to narrate the facts of the case. When the case has been decided a short statement of the leading facts will be furnished the LAW JOURNAL.

37 Clark Street, Chicago.

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE, Editor and Business Manager.

H. D. JEWELL,

Managing Editors.

ELI R. SUTTON.

**J. E. ROBERTS,
ARTHUR WEBSTER,**

ASSISTANT EDITORS.

**W. M. HARVEY,
O. B. VANHORN.**

Published monthly, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

CHIEF JUSTICE HORTON, of the Kansas Supreme Court, contributes an article to this number upon "Limiting the Liability of Common Carriers in Transporting Goods and Live Stock," which is particularly valuable because of the great conflict of decisions upon the matters therein referred to, especially as to the power of carriers limiting their liabilities for loss by special receipts or contracts. He has stated the law as declared by the United States Supreme Court, and what he considers the best authorities. Judge Horton has recently delivered valuable opinions upon these matters, in *Express Co. v. Foley*, 46 Kas., 457, and *Railroad Co. v. Dill*, Kansas Supreme Court, February 5, 1892.

IN THIS issue we print in full the decision in the case of *Detroit Transportation Company v. Board of Assessors of the City of Detroit*, with some valuable notes thereon by Prof. J. C. Knowlton. The case is one of more than ordinary interest, involving as it does the important legal question of the right of a corporation to fix a certain residence for taxation purposes. We shall probably hereafter give reports in full of one or more cases of especial interest, with proper notes and annotations. The decisions of the Michigan Supreme Court have always been held in high esteem, and the Michigan reports are among those more frequently quoted. The present bench is no exception. It is composed of representative, hard-working lawyers. Cases of great importance are continually coming before them, and their decisions are often deserving of wider notice than they receive. As has already been announced, it is our purpose to make the JOURNAL not only entertaining and instructive to the lawyers and students of law generally, but also of practical value to the practicing lawyer. The first object we think is being accomplished in the essays and dissertations on legal topics which are given in each number; the latter end we hope to accomplish by articles upon technical legal

subjects by writers who have made them a special study, by notes and comments upon leading current decisions, by the monthly digest of Michigan decisions, and by the reporting in full of decisions of unusual interest and importance.

THE Miner electoral law, which has received a thorough discussion in the first three numbers of the *LAW JOURNAL*, will no doubt play an important part in the political campaign in Michigan. The Republican leaders, it is well known, have been for some time trying to devise some means whereby a judicial decision by the Supreme Court upon the constitutionality of the law could be obtained. A plan has at last been agreed upon. Their state convention was held earlier than usual and electors nominated under the provisions of the old law. On Tuesday last Col. H. M. Duffield, of Detroit, counsel for the electors chosen, appeared before the supreme court and asked for a mandamus to compel the secretary of state to have delivered to the sheriffs in the state notices in writing, between July 1 and September 1, that at the next general election there will be chosen electors for President and Vice-President of the United States, for the State of Michigan. This appears to be the most feasible way to test the constitutionality of the law, and the decision of the supreme court will be awaited with interest.

The Supreme Court of this state should be commended in their efforts to secure the observance of professional courtesy in the conduct of trials. Several decisions have recently been reversed, and new trials ordered, where counsel have used unbecoming language in the cross-examination of witnesses, and made extraneous statements in their arguments, which tend to prejudice the minds of the jurors in arriving at their decisions. A prejudice too often exists under ordinary circumstances, and justice demands that the merits of the case under consideration, and those only, should be considered, and in a fair and impartial manner. Even the ruling of the court cannot in many cases cure such errors, nor prevent their harmful effects. In *Thompson v. T., A. A. & N. M., Ry. Co.*, a brief abstract of which is given on another page of this issue of the *JOURNAL*, Judge Grant says: "This court has frequently condemned such practices, and has reversed cases for remarks by counsel less harmful than these. The object of trials in courts is to reach justice. It cannot be said to have been reached where such language is used. I think trial courts, of their own motion, should set aside verdicts where such means have been resorted to."

Courts of other states have rendered similar opinions. In *Commonwealth v. Bruner*, a very recent Pennsylvania case, reported in *Pittsburg Legal Journal*, April 20, the court very consistently held that it makes no difference whether the statements so made actually prejudiced the jury or not. If they were calculated to improperly influence the minds of the jury it is sufficient cause for a new trial.

By the death of Samuel S. Chipman, of Grand Rapids, the Michigan Bar loses one of its most learned, but at the same time most eccentric members. He was, some years ago, a prominent attorney. He was an enthusiastic student, a deep thinker, a powerful and eloquent speaker, and a man of broad and liberal culture. But he chose to stifle all ambitions and worldly aspirations. In the seclusion of his library, buried in his manuscript, he soon became a veritable book-worm. Of all his writings,

comprising several volumes and covering a wide range of subjects, from short stories and sketches of travel to exhaustive treatises on law, political economy and mental and moral philosophy, not a line did he ever publish. A lesson can be drawn from the following review of his life in one of the papers of his native city:

"In the death of Samuel S. Chipman a familiar figure is removed from active life. He was a man of superior mental attainments, and had he applied himself to higher and nobler aspirations he might have been second to none in erudition and brilliancy of intellect. He was his own enemy, and handicapped by an incurable and inexplicable disease he ran his course against odds, and in the contest lost both renown and life. He was withal a cheery, companionable man and his conversation was always inspiring. From a well-selected stock of literary lore he could entertain the savant and delight the student. He loved musty tomes, and the lamp in his office window shone late into the night at all seasons while he pored over the yellow pages. Instinctively a student, he developed a mania for researches in the mazes of legend, story and tradition shadowing the earlier times of the northwest. The only legacy he leaves to the world after a mis-spent life, is some volumes of unpublished stories. His friends, for he had many, will miss him. There will be a vacancy in the places he filled and perhaps unshed tears will follow him to his grave. Soon he will be forgotten. Above his ashes in the graveyard where he shall sleep his long sleep a simple tablet may appropriately bear the inscription—

'Nothing but leaves.' "

NOTES AND COMMENTS.

H. D. J.

WHAT IS ORNAMENTAL TIMBER?—What is “ornamental timber” in such a legal sense that a tenant-for-life can be restrained from cutting it? This was the interesting question involved in *Marquis of Stafford v. Duke of Sutherland*, Chancery Division, March 29, a note of which is given in the *Law Journal* (London) April 2. In deciding it North, J., held that the question whether timber was ornamental or not depends not upon the fact whether it was, as a matter of taste, an ornament, but whether it had been planted or left standing for purposes of ornament; that such timber must have been planted or left standing for that purpose by some one having the absolute power of disposition, and in that case a tenant for life could not vary the estate.

WHAT IS A RAILWAY STATION?—Under ordinary circumstances this may not be thought to be a question for courts to interest themselves in; but the question did come before the Michigan Supreme Court very recently, in *P. H. & N. W. R. R. Co. v. Richards*, 51 N. W. Rep., 680, an abstract of which was also given in a previous number of the *LAW JOURNAL* (No. 3, p. 114.) The railroad company, in constructing its road, had secured several of the customary “aid-notes.” Defendant executed a note payable upon condition that the company erect a regular station for freight and passengers at a certain point. In a suit brought upon this note the court, in an opinion by McGrath, J., very properly held that a building 12x20 feet, not left in charge of any person, and no agent being stationed thereat to sell tickets or execute bills of lading for freight, was *not* a regular station, and therefore no consideration for the note.

LIABILITY OF WATER COMPANIES TO PRIVATE CITIZENS.—The Supreme Court of Kansas, in a very recent case, *Mott v. Cherryvale Water & Mfg. Co.*, reported in the *Central Law Journal*, April 8, decides that a water company can not be held liable at the suit of a private citizen for loss by fire because of the failure of the company to provide water, even though the company had contracted to pay all damages that might accrue to any citizen by reason of the failure to supply a sufficient amount of water. In the opinion written by Horton, C. J., it is said: “The fact that a city levies and collects a tax to be paid to a water company does not create any privity of interest between the water company and a citizen or a resident of the city. * * * If a city is not liable to its citizens as residents, the water company is not liable to such citizens or residents upon a contract between it and the city. The contract, in such a case, is between the city and water company only.”

IS A PARENT WHO PURCHASES HIS CHILD A TOY AIR-GUN GUILTY OF NEGLIGENCE?—In *Harris v. Cameron*, Wisconsin Supreme Court, Feb. 2, it was sought to hold a parent guilty of negligence in buying his eleven year old son a toy air-gun. While playing with several playmates, one of the latter took the air-gun, pointed it at another playmate and fired

destroying one of his eyes. It was sought to recover against the father of the boy who owned the gun for negligence in providing his son with a dangerous toy. But the court in a very able opinion by Orton, J., held that he was not guilty of negligence. "An air-gun is not dangerous in itself, and not intended to be dangerous or to do mischief. It is presumed that he bought it to be used in the natural and common way. He had no reason to expect that it would ever be used to shoot a boy's eye out. He is only responsible for the consequences which naturally, commonly and reasonably follow its proper and natural use."

RIGHT OF JUDGES TO GIVE JURORS PRIVATE INSTRUCTIONS.—A somewhat novel point of law is laid down by Morse, C. J., in *Hopkins v. Bishop*, a very recent Michigan case, an abstract of which is given on another page. It is there held: "The court has no right to send an answer to the jury room to a question propounded in writing to him by the jurors, after they have retired to deliberate upon their verdict, without the consent of counsel in the case." It is obvious that no decision could be more just. The liberties which some judges have taken in instructing juries privately can not be too strongly rebuked. Counsel in a case have an undeniable right to be informed fully on every step in a trial until the bringing in of the verdict. The evil results that might follow, were a judge allowed to bring his personal influence to bear upon the deliberations of the sacred jury room, are apparent. He has clearly no more right to communicate with a jury than any other person. Every word which passes between them should be uttered in open court and taken with the other proceedings by the stenographer.

VALIDITY OF CITY ORDINANCES.—The extent to which the common council of a city may go in the passage of ordinances was given a thorough test in a case of considerable local interest tried before the Superior Court of the city of Grand Rapids last week. The common council of that city had passed an ordinance, known as the "Milk Inspection Ordinance," by which they had undertaken to regulate the milk traffic in that city. The ordinance was a unique affair and minute in every detail. It began by defining a "milk-man," and then provided for a license, which every dealer should obtain from the council, upon recommendation of the board of health, before engaging in the business. In order to obtain this recommendation the milk dealer was obliged to tread a very narrow path. The manner of caring for his cows, the time they were to be turned out to pasture, what they should and should not be fed, the time they were to be turned out in open air each day, the construction and drainage of stables, etc., were all carefully provided for; and in addition to this the number of cows and place where they were to be kept must have been stated. A certain dealer refused to take out a license and continued to sell without. He was arrested for a violation of the ordinance and a test-case made. The case was very thoroughly tried and will probably not be taken to a higher court. In holding the ordinance invalid, Judge Burlingame said, in part: "The common council has in this ordinance virtually said that no farmer shall sell or have sold in the city of Grand Rapids the milk product of his farm unless he conducts that farm according to the formula laid down in minutiae for his guidance by the common council of this city. * * * I do not think that under such circumstances any person in law is required to make application even for such a license; and much less do

I think a person should be arrested, tried, convicted and punished as a criminal who neglected or refused to make application for such a license under such circumstances. The Court is of the opinion that the ordinance, so far as it required the respondent to take out a license, is, on account of its unreasonable and impossible conditions, null and void, and therefore the maxim that every person is presumed to know the law, is not unduly stretched in presuming that the respondent knew what was not good law, and therefore cannot be held liable for not applying for a license which he knew was impossible for the common council to grant if they lived up to their own requirements. The respondent is found not guilty and is discharged."

WHAT IS A PRIZE FIGHT?—This question is not one which the majority of people care anything particularly about, or pay attention to in the least, except when the papers, in glowing head-lines, chronicle a match of more than ordinary interest. The technical meaning of the term is usually left to the admirers of the so-called "manly art" to determine as they see fit. But the Supreme Court of Ohio has decided that common individuals, such as comprise an ordinary jury, *can* tell what a prize fight is as well as one who makes that his profession. In *Deville v. State of Ohio*, decided March 2, and reported in the *Law Bulletin* (Columbus), April 18, the question was squarely before the court. Plaintiff in error had been indicted and convicted. Upon trial in the court below he had sought to show, by a witness who had been engaged in fifty-seven prize fights, and by papers said to contain the "Queensbury Rules" and "London Prize Ring Rules," that the contest was a *glove contest* and not a *prize fight*. The trial judge sustained an objection to the admission of this evidence. The case was taken to the Supreme Court, and in affirming the decision of the trial judge Williams, J., said: "The question for the jury to decide was, whether this combat was a prize fight; not what the Queensbury Rules, or any other rules, called it; nor what name those accustomed to such combats have given it. What was it in plain English? And this question of fact, under a proper instruction from the court as to what constitutes a prize fight, the jury was as competent to decide, as the most experienced boxer or prize-fighter. The question was not one of skill, or science, to be decided upon the opinions of those experienced in such practices, or by the rules adopted for the government of associations of such persons; but one within the comprehension of common understanding, and the range of common knowledge, which the jury could decide upon the facts proven as well as a professional pugilist."

TESTAMENTARY RIGHTS OF ILLEGITIMATE CHILDREN.—An interesting phase of this question was before the English Court a few days ago in *Danily v. Plutt*, Chancery Division, April 6. The following note of the decision in that case was given in the *Law Journal* (London) April 16: "Testator, believing that his brother Joseph Lowe and Barbara Taylor were married, by will, dated in 1889, gave 'to each of the children of my brother Joseph Lowe who shall be living at my decease, except his eldest son Ernest Joseph Lowe and his daughter Mary Louisa Lowe, 100l.' He also gave a fund to trustees in trust to apply the income for the benefit of his said brother, 'or of his wife, or all or any of his children' during his brother's life, and after his death pay the income 'to the present wife of my said brother Joseph Lowe, if she shall become his

widow,' for life, with remainder in trust for 'all the children' of his said brother, 'except his eldest son Ernest Joseph Lowe and his daughter Mary Louisa Lowe' as therein mentioned. Elsewhere in his will and a codicil of even date the testator spoke of his 'nephew Ernest Joseph Lowe' and of the 'brother of the said Ernest Joseph Lowe,' and 'all the other children' of Joseph Lowe. He gave his residuary personal estate to his 'niece Mary Louisa Lowe, daughter of' his said brother. Joseph Lowe died in 1890. The testator died in 1891. Joseph Lowe had been married many years before, and his wife died in 1875, leaving two children, Mary Louisa and another daughter, who survived the testator. Joseph Lowe subsequently cohabited with Barbara Taylor, by whom he had seven illegitimate children, including Ernest Joseph, all of whom survived the testator, and one of whom was born after the date of the will. A summons was taken out by the executors to ascertain how far these gifts were valid. North J., held that all the gifts were valid, except that the illegitimate child born after the date of the will was excluded."

STATE CONTROL OF ELEVATORS.—The *Albany Law Journal*, April 23, gives a report in full of *Budd v. People* and two other very important cases, in which the same point was involved, decided in the U. S. Supreme Court, Feb. 29. The point in controversy was the validity of an act of the New York legislature (Laws of 1888, c. 581) entitled; "An act to regulate the fees and charges for elevating, trimming, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this State." The main question involved in the cases was whether the court would adhere to its decision in the celebrated leading case of *Munn v. Illinois*, 94 U. S., 113. In a very able opinion by Mr. Justice Blatchford, in which the majority of the court concurred, the decision in that case was followed, and the principle was distinctly enunciated that: "A State has power to regulate the charges of grain elevators carried on by individuals, and to enact that a violation of such a regulation shall be a misdemeanor."

To this theory Mr. Justice Brewer objects, and writes a strong dissenting opinion, which is concurred in by Mr. Justice Field and Mr. Justice Brown. Among other things he says: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of the government. If it may regulate the price of one service, which is not a public service, or the compensation for one kind of property which is not devoted to a public use, why may it not, with equal reason, regulate the price of all service, and the compensation to be paid for the use of all property? And if so, 'Looking Backward' is nearer than a dream." The decision in these cases will be of more than ordinary interest, as all the authorities bearing upon this interesting question of constitutional law are collected and commented upon, and the two theories thereon fully and ably discussed.

RIGHT OF STOPPAGE IN TRANSITU, WHEN NOT DEFEATED BY SALE OF GOODS TO BONA FIDE PURCHASER.—Contrary to the usually accepted doctrine that the right of stoppage *in transitu* is defeated by a sale of the goods to a *bona fide* purchaser, the Supreme Court of Georgia, in *Ocean Steamship Co. v. Ehrlich*, recently decided, upheld the power of the consignors to exercise the right as to a portion of the consignment, although

the consignees had sold the goods to *bona fide* purchasers. The case is reported in full in the the *New York Law Journal*, April 20, which contains the following syllabus prepared by the court:

"Where, after the freight and wharfage were paid and the bills therefor receipted, the bill of lading was exhibited, but not assigned, and the goods, though upon the wharf, were not actually delivered by the carrier to the consignee, the right of stoppage *in transitu* was not defeated by a sale to a *bona fide* purchases for value, payment of the purchase money, delivery of the freight and wharfage bills, together with an order upon the carrier of the goods, and actual delivery of a part of the goods in pursuance of such order. The goods remaining undelivered when the right of stoppage was exercised were subject to the right."

It appears upon an examination of the facts in the case that the goods had arrived and were put upon the wharf of the steamship company. The freight and wharfage had been paid, the bills therefor receipted, and nothing remained to be done to change the actual possession from the carrier to the consignees except to remove the goods from the wharf. It was the custom of the carrier to deliver goods thus situated, upon presentation of receipted bills for freight and wharfage, without requiring bills of lading to be produced. The consignees sold the goods to the defendants in error, exhibiting to them the bills of lading, but executing no assignment of the same. In lieu of such assignment, however, they delivered to them the receipted freight and wharfage bills, together with an order upon the carrier for the goods. Defendants thereupon paid the agreed purchase price. Under this order a portion of the goods were delivered to their drayman and hauled away. Upon the following day the drayman returned for the residue; but as to the residue the right of stoppage *in transitu* had been exercised on that morning by the consignors, and for this reason the carrier refused to make delivery. Defendants in their suit against the carrier to compel delivery, were successful in the trial court; but the Supreme Court reversed the decision, and laid down the principle above stated, on the ground that there had not been a technical assignment of the bill of lading, and that the law recognized no substitute for such assignment. It must be admitted that this decision draws the line very closely. Under the circumstances stated above, although there may not have been a *technical* assignment of the bill of lading, there certainly was an *equitable* assignment of it, and we are inclined to think that a majority of courts would so hold.

LATE DECISIONS OF THE MICHIGAN SUPREME COURT.

* **WOOD M. & R. MACHINE CO. v. SEAVER.**—*Decided March 11.*—(Grant, J.)

Contract—Warranty—Abandonment and Tender—When Set Off may be Claimed.—Where a harvesting machine is sold with a warranty and a portion of the price paid, in an action for the balance due thereon the money so paid does not become liquidated damages, and subject of set-off, until the question of warranty has been determined. The mere offer by the defendant to let the machine go back is not an abandonment of the contract of sale, nor a tender of the property back. If plaintiff had no cause of action, because the suit was prematurely brought, no other judgment than that of no cause of action could have been rendered; a defendant is only entitled to judgment by reason of his set-off when the plaintiff's demand is due.

* **ASHMAN V. F & P. M. R. R. CO.**—*Decided March 11.*—(Morse, C. J.)

Railroad Companies—Liability for Injuries Caused by Unblocked Frogs—Liability for Neglect of Servants—Negligence a Question for Jury—Variance—Waiver.—Plaintiff brought action to recover damages for personal injuries received while switching cars in the yard of the defendant, and alleged, as the negligence of the defendant, the leaving of a frog unblocked, in which he caught his foot while coupling cars, thereby causing his injury. *Held*, (1) That under Public Acts of 1883, p. 191, providing especially, under pecuniary penalty, that frogs shall be filled and blocked, a railway company who permits such frogs to remain unfilled and unblocked, with their knowledge, or for such length of time that knowledge or neglect of duty will be presumed, is guilty of actionable negligence, and liable in damages to one who, without fault on his part, is injured thereby. (2) This duty imposed by the statute is one which cannot be delegated to the company's employees, so as to relieve it from its obligation; it is such a duty that the person, or persons to whom it is entrusted, will stand in the place of the master, and their neglect will be its neglect. (76 Mich., 139; 78 M., 492; 79 M., 409; 80 M., 56; 81 M., 423; 84 M., 100; 85 M., 519; 84 M., 289; 49 N. W. R., 666.) (3) The question of negligence is one for the jury and not for the court. (17 Mich., 99; 44 M., 461; 71 M., 364; 78 M., 271; 80 M., 172; 82 M., 1; 84 M., 100; 85 M., 519; 87 M., 101; 87 M., 599; 59 M., 458; 58 M., 568; 70 M., 226; 61 M., 584; 64 M., 447; 78 M., 206; 58 M., 592; 8 Allen, 442; 60 N. Y., 207; 58 Iowa, 150; 13 N. W. R., 731; 23 Pac. R., 751.) (4) It is not a material variance where the declaration sets forth that the plaintiff was employed as a switchman and the proofs show that he was the conductor of a switch engine, or foreman of a switching crew. (5) Where appellees make a number of assignments of error, and pass them over in their brief and in the oral argument without mention, the court will treat them as waived.

BENNETT, et al., Relators, v. HANLEY, Sheriff.—*Decided April 7.*—(Per Curiam.)

Execution—Right to Set Off against Another Execution.—Where the relators have secured a judgment and execution for costs from the Supreme Court on appeal, but, on the case being remanded for another trial, have been defeated in the new trial and execution granted against them, they are entitled to have the former execution set off against the latter, even though the latter has been assigned to a bona fide holder; and the fact that the judgment and execution in the Circuit Court is also against a surety does not prevent the set off. (*Bent v. Pierce*, 69 Me., 381; *Northam v. Gordon*, 23 Cal., 255.)

BURNS V. KIRKPATRICK.—*Decided April 8.*—(Grant, J.)

Trespass *de Bonis Asportatis*.—One who enters another's home, forcibly ejects him, and removes his goods to another house, is guilty of trespass, though he acts under the direction of the latter's wife. Though the plaintiff could not dispose of the goods without the wife's consent, yet the title was in him, and defendant had no right to enter plaintiff's home, drive him therefrom; and then assist the wife in removing the property.

KIMBLE V. HARRINGTON, et al.—Decided April 8.—(Montgomery, J.)

Mortgage—Bill to Reform—Rights of Subsequent Mortgagee—Notice of Error.—Where a bill is filed to foreclose and at the same time to reform a mortgage, a subsequent mortgagee, who claims to be a bona fide mortgagee, must show absolute good faith; and his defense will not avail if it appears, from all the circumstances, that he had notice of the mistake or omission at the time he accepted his mortgage.

ROSCOE V. McDONALD.—Decided April 8.—(McGrath, J.)

Executrix—Right to Bind Estate by Contract—Necessities—Rights of Creditors when Executrix Insolvent.—The executrix has no power to bind the estate by contract. Before the estate of an infant can be pledged, even for necessities, the Probate Court must pass upon the necessity therefor. Where it is sought to charge an estate, the executrix of which is insolvent, the complainant is only entitled to be put in the place of the executrix, and if there is already a balance against her, complainant has no equities.

GRANT, Relator, v. COMMON COUNCIL AND BOARD OF PUBLIC WORKS OF DETROIT.—Decided April 8.—(Morse, C. J.)

Contracts with Cities—Right of Common Council to Reject.—Where a city charter provides that no public work shall be commenced until the contract therefor shall be approved and confirmed by the Common Council, such approval is not a mere matter of form, but a necessary requisite to the validity of the contract. The power to approve implies the power to reject; and in the absence of any fraud, or any violation of law in respect to the lowest responsible bidder, the Common Council have a right to reject a contract and refuse to go on with the work.

BANK OF MONTREAL V. POTTS SALT & LUMBER CO.—Decided April 8.—(McGrath, J.)

Manufacturer's Lien—What Amounts to Surrender of Possession.—A person who has contracted to manufacture salt and to be "responsible for the said salt until it shall be delivered to the boats or vessels from the said dock, and deliver it only upon the written order of the said party of the second part," does not lose his lien by storing the salt on the docks; he does not thereby surrender his possession to the mortgagees or receivers of the party with whom he contracted. (*Chadwick v. Broadwell*, 27 Mich., 6, followed, and *McMaster v. Merrick*, 41 Mich., 505, distinguished.)

DE ZWAAN V. DE ZWAAN.—Decided April 8.—(Morse, C. J.)

Divorce—Failure to Provide Domestic Help for Wife as Ground for Divorce.—Complainant, a young girl of twenty, in delicate health, married defendant, a well-to-do farmer, forty years of age, with a family of six children by former marriages. Defendant was acquainted with her condition before marriage and promised to hire a girl to do the heavy work. After marriage he refused to fulfil his promise in this respect and compelled complainant to do more work than she was capable of doing in her state of health, and she was forced to leave him. *Held*, sufficient grounds for divorce, even though no other grounds of cruelty were shown.

PECARD V. HOME & CO.—Decided April 8.—(Montgomery, J.)

Garnishment—Compliance with Statutory Provisions.—Under Section 28 of amendatory act relating to garnishment, being Act No. 175, Public Acts of 1885, a judgment for the plaintiff against a claimant is not binding where the proper steps have not been taken to bind the garnishee defendant; as, where the garnishee was not compelled to deliver money or property or indebtedness to the justice. The citation of the claimant and his appearance, if he does not waive any irregularity in the proceedings, does not conclude him from recovering from the garnishee defendant, and also make the claimant answerable to the proper plaintiff for a fund not in his hands.

HOPKINS V. BISHOP, Sheriff.—Decided April 8.—(Morse, C. J.)

Replevin—Demand—Fraudulent Conveyances—Burden of Proof—Right of Court to Answer Questions to Jury after Retirement.—In an action of replevin for goods upon which an attachment has been levied no demand before suit is requisite, if, at the time of the levy, the goods seized are the property of the person suing in replevin. (*Trudo v. Anderson*, 10 Mich., 357.) In determining whether a transfer is valid, as between vendor and existing creditors, the burden is not upon the defendant to prove that the transfer was a fraudulent one, but if the possession of the goods has not been actually and continually in the plaintiff from the delivery up to the

time of the levy, then the burden is upon the plaintiff to show that the sale was an honest one. (*Doyle v. Stevens*, 4 Mich., 93; *Butler v. Stoddard*, 7 Paige, 166; *Clark v. Lee*, 78 Mich., 231.) The court has no right to send an answer to the jury room to a question propounded in writing to him by the jurors, after they have retired to deliberate upon their verdict, without the consent of the counsel in the case.

IN THE MATTER OF THE APPLICATION OF F. & P. M. R. R. CO. TO TAKE UP TRACK ETC.—*Decided April 8.*—(Grant, J.)

Railroads—Right to Abandon Track—Repayment of Contributions—Title to Right-of-Way, etc., Abandoned.—A railroad company may, by observing statutory requirements, abandon a portion of its road when such portion can be maintained only at a loss and public necessity has demanded a change of route. But persons who contributed for the construction of the road must be repaid the amount of such contributions, with interest, and the title to the right-of-way, and other grounds abandoned, reverts to the original owners without any re-conveyance or order of the court. (*Ayres v. Dutton*, 87 Mich., 528, distinguished.)

CADWELL V. COREY.—*Decided April 8.*—(McGrath, J.)

Malicious Prosecution—Right to Join Counts Charging Slander—Effect of Dissolution of Attachment Upon Which Action is Based.—In an action for malicious prosecution, the gravamen of the action being defamation of character, the plaintiff may prove other charges of the same slanderous character which are calculated to produce the same effect. He is entitled to set them up in a separate count in the same declaration, and go to trial upon them in connection with other allegations, and he is not compelled to elect which count, or counts of his declaration he will proceed under. The subsequent dissolution of the attachment, upon which the action for malicious prosecution was based, will not constitute a bar to such action. (*Brand v. Hinchman*, 68 Mich., 590.)

CURTIS V. WILCOX.—*Decided April 8.*—(Morse, C. J.)

Trover—Mala Fide Creditors—When Estopped from Asserting Claim—Evidence of Filing of Chattel Mortgage.—In an action of trover against a sheriff, who has levied upon certain goods at the suit of creditors, the plaintiffs, who claim title under a chattel mortgage, are bound to show good faith in their dealings with the debtor, and the jury should be instructed to take into consideration, as bearing upon the question of fraud, the whole course of dealings between them, and statements made by plaintiffs tending to mislead other creditors. Testimony that copy of mortgage was left with township clerk for filing is not best evidence of such filing, and cannot be considered until the copy has been produced with the filing upon it, or some showing made why it cannot be produced.

SCHISLER V. NULL.—*Decided April 8.*—(Morse, C. J.)

Assumpsit—Proof of Settlement—Instructions to Jury.—In an action of assumpsit, for a general balance due on a long course of dealing between the parties, when the defendant sets up a former settlement, it is not error for the court to instruct the jury that the burden was upon the defendant to prove that there had been a "fair and full settlement." As the court had already said to the jury that the settlement must be shown to have been one that the parties understood and agreed to—that their minds came together upon it—the jury could not be misled, or infer that the word "full" meant a settlement which precluded any further dealings, or that the word "fair" placed the burden of proving its fairness upon the defendant, when the fairness of the settlement, if made at all, was not denied.

TOWLE V. FARMER'S MUTUAL FIRE INS. CO.—*Decided April 8.*—(Montgomery, J.)

Fire Insurance Policy—Proofs of Loss—Waiver of Defenses—Right of Mutual Insurance Company to Waive Forfeiture.—In an action on a fire insurance policy it is for the jury to decide whether mis-statements of the insured in his proofs of loss were made with intent to defraud, and also whether there has been a violation of the company's by-laws. If the plaintiff is right in his contention that as matter of law the undisputed testimony shows that certain defenses were waived by the insurance company, it then becomes the duty of the court to so instruct the jury, and it is not error to permit the jury to find such waiver as matter of fact from insufficient evidence. (*Carpenter v. Ins. Co.*, 61 Mich., 635; *Marthinson v. Ins. Co.*, 64 Mich., 572; *Cobbs v. Ins. Co.*, 68 Mich., 465; *Cleaver v. Ins. Co.*, 71 Mich., 421; *Richards v. Ins. Co.*, 60 Mich., 427.) The company should apprise the insured fully of its posi-

tion in defending a claim, and by failing to do so it estops itself from asserting any other defense than that brought to the notice of the insured. (*Casten v. Ins. Co.*, 46 Mich., 15; *Richards v. Ins. Co.*, 60 Mich., 420.) In this State a mutual insurance company may waive a forfeiture of its policy if the assumed action of the company is by those authorized to act for it, and with full knowledge of the facts. (*Olmstead v. Ins. Co.*, 50 Mich., 200; *City Planing Mill v. Ins. Co.*, 72 Mich., 654. The case of *Williams v. Ins. Co.*, 19 Mich., 468, distinguished.)

BAKER v. F. & P. M. R. R. Co.—Decided April 8.—(Long, J.)

Infants—Injuries to—Right of Parent to Recover—Estoppel.—A father has a right to recover against a railroad company for injuries to his infant son whereby he has been deprived of his services, and the infant has no right to recover such damages without the consent of his father; but if the father has allowed the son to recover, and given his consent by taking part in the trial as next friend, he is thereafter estopped from setting up claim for the same damages in an action in his own name. The participation in the former suit by the father, as next friend, is tantamount to a manumission of the infant and relinquishment of claim to his wages. (*Wilton v. R. R. Co.*, 125 Mass., 130; *R. R. Co. v. Manin*, 25 American & English R. R. Cases, 539, and *Durkee v. R. R. Co.*, 56 Cal., 388, distinguished.)

THOMPSON v. T., A. A. & N. M. RY. Co.—Decided April 8.—(Grant, J.)

Contributory Negligence—Question for Jury—Joining of Immaterial Charges in Declaration—Language of Counsel.—In an action against a railroad company for injuries alleged to have been caused by negligence, the question whether the complainant has been guilty of contributory negligence should be left to the jury. The uniting of immaterial charges in a declaration with those that are material and necessary does not preclude a recovery, but the trial court should eliminate such immaterial charges from the consideration of the jury, and limit their consideration to the other acts alleged, which, if found to exist, constitute negligence. (*Warmadorf v. R. R. Co.*, 75 Mich., 472, dis. *Thorsen v. Babcock*, 68 Mich., 526.) Language of counsel, which has a natural tendency to prejudice the minds of jurors, is ground for new trial. The effect of such statements cannot be cured by the ruling of the trial judge.

DEWEY v. TOLEDO, A. A. & N. MICH. R. R. Co.—Filed April 8.—(Long, J.—

Estoppel—Affidavit Accompanying General Issue—Plea of *Ultra Vires*—Under a plea of the general issue, in an action to recover upon a promissory note, where, by Rule 79 of the Circuit Court Rules which provides that the plaintiff shall not be put to proof of the execution of any instrument under seal, or the handwriting of the defendant, unless the defendant shall file an affidavit denying the same, the defendant has failed to file an affidavit, the effect of the rule is to admit the execution of the promissory note, and it is not error to admit the note in evidence. Where the officers of a corporation have executed a promissory note, ostensibly without authority, and have received value for the same, the corporation will not be heard to interpose a plea of *ultra vires*. It is estopped from denying the validity of the contract since it has received all the benefits under it. *Carson City Savings Bank v. Carson City Elevator Co.*, decided in present term, (Mich. Law Jour., No. 3, p. 114), followed.

PEOPLE *ex rel.* FULLER v. PALMER.—Decided April 8.—(Long, J.)

Probate Judge—When Elections To Fill Vacancy May Be Held—Distinction between General and Special Elections.—A person duly appointed to the office of Probate Judge, to fill vacancy caused by resignation, is entitled to hold the office until his successor is duly elected. The regular time for the election of Probate Judge being at the general election in November, such election can only be held at a general election, or at a special election regularly called according to the terms of the statute. The regular Spring election is not a "general election," and a person elected to fill the vacancy at such election is not regularly elected, unless the special provisions as to special elections have been followed. (*Westinghansen v. People*, 44 Mich. 265; *People v. Lord*, 9 Mich., 226; *People v. Stevens*, 89 Ill. 337.) The fact that the people voted for the several candidates put in nomination cannot aid the relator's claim for the reason that the election was not held by legal authority. (*People v. Porter*, 6 Cal., 26.) *Adsit v. Secretary of State*, 84 Mich., 420; *Att'y. General v. Highland Park*, 50 N. W. R., 660, and *Lawrence v. Trombly*, 50 N. W. R., 744, distinguished.

In re Estate of JOHN PHILLIPS.—Decided April 22.—(Morse, C. J.)

Statute of Distributions—Widow's Right of Election under Will—Construction of Statute.—Under 2 How. Stat., §§ 5824, 5847, "residue of the estate" must be construed to mean what is left after a certain sum, one-third of which equals the statutory limit, has been deducted, and not the whole sum to be distributed after the payment of debts, expenses and special legacies.

FITZPATRICK V. FITZPATRICK.—Decided April 22.—(Long, J.)

Deed—Conveyance upon Condition.—Where property is conveyed by deed, upon condition that the grantee will support the grantor during his lifetime, which condition is subsequently violated, the deed will not be set aside, but the grantee will be compelled to carry out the intention of the grantor, as far as practicable, by furnishing an amount stipulated by the court, during the life or the grantor, (Montgomery, J. dissenting.)

ATTORNEY GENERAL V. WAYNE COUNTY TREASURER.—Decided April 22.—(Per Curiam.)

Liquor Tax—Right of County Treasurer to Issue Receipt before Filing of Bond.—Mandamus will lie directing the county treasurer to refrain from receiving and receipting for a liquor tax before the filing of the bond required by statute, though there is no express provision requiring the approval and filing of the bond to precede the issuing of the receipt for the tax.

CURTISS V. SHELDON.—Decided April 22.—(Grant, J.)

Redemption—Grounds for Setting Aside Decree—Interest—Rents.—The decree in a bill to redeem will not be set aside because it allows the defendant ten per cent. on his loans when that rate of interest had been fixed by the parties at a time when that was a legal and common rate of interest. Neither will it be set aside because the defendant has been held accountable for the rents actually received instead of the rents which it is claimed he might have received.

WALLEN V. DWYER.—Decided April 22.—(Morse, C. J.)

Trover—Declaration—Evidence Admissible Under.—In an action of trover by the assignee of a valid chattel mortgage it is not necessary that the declaration allege the assignment of the mortgagee's right of action. Declarations of replevin and trover do not undertake to notify the defendant of the nature of the plaintiff's title, or what are the evidences of it. (Harvey v. McAdams, 32 Mich., 472; Myers v. Yapple, 60 Mich., 339; Williams v. Roper, 67 Mich., 427; Hutchinson v. Whitmore, 51 N. W. Rep., 451.)

POKRIEFKA V. MACHURIAT.—Decided April 22.—(McGrath, J.)

Assault and Battery—Evidence—Rebutting Testimony.—In an action for assault and battery evidence as to defendant's good character is inadmissible. (Fahey v. Cratty, 68 Mich., 383.) Plaintiff is entitled to show all that occurred, and it is error to exclude or comment unfavorably upon any testimony tending to prove any of the circumstances leading to the assault. Where defendant has offered testimony tending to show some other cause for plaintiff's injury, it is error to exclude testimony offered in rebuttal contradicting defendant's theory.

WELLMAN V. BOARD OF METROPOLITAN POLICE OF DETROIT.—Decided April 22.—(Montgomery, J.)

Police Officers—Right of Board of Police to Dismiss for Commission of Felony.—In dismissing a person from the office of patrolman, if the question of fitness for the office involves an inquiry as to whether he has been guilty of a criminal offense, to the extent that it is necessary to determine the question of fitness, the Board of Police have a right to enter upon the trial of his guilt, even for a felony; he cannot shield himself from dismissal by averring that the charges against him were too serious for the board to consider.

KIRCHNER V. DETROIT CITY R. R. Co.—Decided April 22.—(Long, J.)

Negligence—Instructions—Remarks Tending to Prejudice Jury.—In an action to recover for personal injuries sustained at the instance of a street R. R. Co., it is not error for the trial judge to instruct the jury that the ringing of a signal bell by the conductor to start the car before the passenger has alighted is negligence *per se*, and will render the company liable for injuries resulting therefrom in absence of contributory negligence on the part of the passenger. Where the plaintiff attempted

to show that he was not a drunkard, contemplating that defendant would interpose such defense, and where the defendant then and there denied that any such defense was to be made, if no further mention was made of such declaration during the trial, it is not a serious error that the judge did not order the statements stricken out. *Sweet v. R. R. Co.*, 87 Mich., 559, distinguished.

DAMM V. DAMM.—*Decided April 22.*—(Grant, J.)

Foreclosure—Parties in Interest—Contribution—Rights of Co-tenants.—In foreclosing a mortgage the mortgagee is entitled to a sale of the whole interest mortgaged, and any party owning an interest in the land must pay the whole amount due in order to protect his own interest; the remedy of such party being a proceeding against the other parties to compel contribution. But this rule does not obtain where a co-tenant, whose duty it is to pay his share of the mortgage debt, has purchased the mortgage, and is proceeding to foreclose; no rule of law or equity requires the other parties interested to pay his share in order to protect their own interest.

MCBRIDE V. MCINTYRE, et al.—*Decided April 22.*—(Grant, J.)

Trustee under Will—Bill for Accounting—Acceptance of Trust—Necessary Parties.—In an action for an accounting against a trustee under a will by one of the beneficiaries thereunder, the court of chancery and not the probate court is the proper tribunal. It is not necessary that the trustee shall have formally accepted the trust, if the trust fund, or any part thereof, has come into his possession and been treated as such. Parties who have received portions of that trust fund should be made co-defendants, and their liability will depend upon the proofs. The executor of the will is not in such case a necessary party. *Weaver v. Van Akin*, 77 Mich., 588, followed.

LANSING IRON AND ENGINE WORKS V. WALKER.—*Decided April 32.*—(Morse, C. J.)

Fixtures—When Real or Personal—Intention of Parties.—A boiler, engine, sawmill and carriage attached to realty by the owner of an undivided interest therein, under a contract that the title and right of possession shall remain in the vendor of the machinery until the price is paid in full, is not a chattel real. The fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter, cannot render the former a fixture when the interests are different in extent. A thing cannot as to an undivided interest therein, be real estate, and as to another undivided interest be personalty. (*Adams v. Lee*, 31 Mich., 439; *Morrison v. Berry*, 42 Mich., 389; *Knowlton v. Johnson*, 37 Mich., 47; *Manwaring v. Jennison*, 61 Mich., 117.)

BOOK REVIEWS.

THE SUPREME COURT OF THE STATES AND PROVINCES OF NORTH AMERICA.—Clark Bell. New York: Medico-Legal Journal.

This is a series of historical sketches of the Supreme Courts of the States, which is to appear as a supplement to the Medico-Legal Journal. The sketches will be prepared by the Chief Justices of the courts, or under their supervision, and will be edited by Dr. Bell, the editor of the Medico-Legal Journal. They will contain portraits of the present chief and associate justices, sketches and portraits of former judges and information as to the courts. These sketches will ultimately appear in a volume. There will be no prescribed order, but they will appear in the order of their preparation. The first supplement contains the Supreme Courts of Kansas and Texas. Kansas is written by Hon. Albert H. Horton, present chief justice, and Texas by Hon. A. S. Walker, late justice of the Supreme Court.

R. S.

THE FEDERAL POWER OVER COMMERCE, AND ITS EFFECT ON STATE ACTION.—By William Draper Lewis, Ph. D., Member of the Philadelphia Bar. Philadelphia: University of Pennsylvania Press. 1892.

The above is the title-page of an interesting monograph of 145 pages. It is nicely bound in half sheep, printed in plain and handsome type, and very methodically arranged. In his preface the author states that it has been his endeavor "to trace, through the decisions of the supreme court, the origin, growth, and modification of every principle of Constitutional Law relating to the Federal power over commerce, and its effect in curtailing the legislative action of the States." He proceeds upon the theory that no principle relating to interstate commerce can be said to be a part of our constitutional law, until it has been made the basis of a decision of the United States Supreme Court, and has therefore confined himself, in the text, to a discussion of the decisions in that tribunal. After discussing the term "Commerce" and the extent of the power granted to Congress, he considers the nature of the Federal power over commerce, its effect on the general legislative power of the states, on the state power of taxation, and the state police power, and then adds a chapter on the "Doctrine of the Silence of Congress." To this is added a convenient, and rather unique index to the decisions rendered on the subject by the U. S. Supreme Court.

H. D. J.

CONTRACTS IN RESTRAINT OF TRADE.—By George Stuart Patterson. Member of the Philadelphia Bar and Fellow in the Department of Law of the University of Pennsylvania. Philadelphia: University of Pennsylvania Press.

In a well-written essay of seventy pages, bound in half-sheep, the author has discussed all the decisions bearing upon the law of contracts in restraint of trade, with special reference to "trusts." It is a valuable collection of the law on an important subject. The manner in which the subject has been treated can be gained from a glance at the headings of the five chapters into which it is divided:

- I. The Rule and its Historical Reason.
- II. The Consideration of such a Contract.
- III. The Construction of these Contracts, and their Enforcement by Courts of Equity.
- IV. Contracts in Restraint of those Sorts of Business in the Exercise of which the Public has a Peculiar interest.
- V. Restrictions on Competition and Production.

H. D. J.

THE AMERICAN GOVERNMENT.—By B. A. Hinsdale, Ph.D., Professor of the Science and the Art of Teaching in the University of Michigan. Ann Arbor: The Inland Press. Cloth, \$1.50.

It would seem almost impossible that a subject so broad could be treated in anything like a satisfactory manner within the covers of a single volume of less than 500 pages. Yet this is exactly what Professor Hinsdale has undertaken, and he has been remarkably successful in accomplishing his purpose. The book is a handsome, cloth-bound volume of about 460 pages. The first few pages are devoted to an introductory consideration of political science, which is a very valuable essay in itself. The balance of the work is divided into three parts. Part I is a history of the making of the American government, from the time of the planting of the thirteen colonies to the adoption of the Constitution. The memorable events of that period which led up to the great crisis are interestingly told. Part II is devoted to the discussion of the National government; and the establishment and development of its various powers, and means of carrying them into effect, are told in thirty-one interesting chapters. In Part III the State governments and their relation to the Union are ably considered. In conclusion the nature of the American government is especially considered, and to this is added an appendix, giving copies of documents illustrative of the formation of the American Union. The book is conveniently and methodically arranged in paragraphs, making every point therein readily and easily accessible. It is truly *multum in parvo*, and will satisfy a demand which has long been made for something complete yet brief, thorough and comprehensive yet not voluminous. The book is one especially valuable to legal students.

DIRECTORY OF SOCIETIES AND CLUB COURTS.

WEBSTER SOCIETY.

Friday evening at 7:30 in the Webster Hall.
 President, Frank Martin,
 Vice-President, Chas. E. Oliver.
 Secretary, P. M. Troy,
 Treasurer, J. S. Phillips.
 Marshal, L. G. Grundy.

JEFFERSONIAN SOCIETY.

Thursday evening at 7:30 in the Jeffersonian Hall.
 President, Chas. O. Holly,
 Vice-President, J. H. Whitely,
 Corresponding Secretary, W. H. Evans,
 Recording Secretary, John G. Park,
 Critic, Mark Sands.
 Treasurer, H. J. Lovett,
 Marshal, G. A. Jeffers.

DOUGLASS DEBATING SOCIETY.

Saturday at 4 P. M. in the Quiz Room.
 New President and Secretary elected each meeting.
 Treasurer, Wm. Davis.

COSMOPOLITAN DEBATING CLUB.

Saturday afternoon at 2 o'clock in the Quiz Room.
 Succession of officers each week.

BENTON DEBATING CLUB.

Thursday afternoon immediately after lecture, in Room 10.
 President, B. F. Scanlon,
 Vice-President, D. W. McDonald,
 Secretary, J. J. Danhof,
 Treasurer, E. J. Beam,
 Marshal, J. G. Eastep.

BREWSTER DEBATING CLUB.

Each Friday, after junior lecture, in the Quiz Room.
 President, H. L. Williams,
 Vice-President, W. G. Wilson,
 Secretary, B. F. Scanlon.

CLAY DEBATING CLUB.

Saturday afternoon at 4 o'clock in Prof. Griffin's Room.
 President, Howard J. Slagle,
 Vice-President, Lyman G. Grundy,
 Secretary and Treasurer, Miles W. Newby.

ABBOTT DEBATING SOCIETY.

Saturday afternoon at 1:30 in Prof. Griffin's Room.
 President, B. V. Newton,
 Vice-President, C. B. McNay,
 Secretary, T. W. Slick.

MICHIGAN CLUB COURT.

Monday evening at 7:30 in the Quiz Room.
 Chief Justice, G. M. O'Connor,
 Associate Justice, J. G. Erdlitz,
 Prosecuting Attorney, G. H. Cross,
 Clerk, E. J. Vickery,
 Sheriff, John Knauff.

POST GRADUATE CLUB COURT.

Tuesday evening at 7:30 in the Quiz Room.
 Chief Justice, L. W. Hughes,
 Assistant Justice, W. H. Sears,
 Clerk, F. J. Cosgrave,
 Sheriff, M. Roach.

COOLEY CLUB COURT.

Friday at 2 P. M. in Room 10.
 Judge, G. H. Cross,
 Clerk, C. H. Thomas,
 Sheriff, E. J. Bean,
 Prosecuting Attorney, J. Kennedy.

GRIFFIN CLUB COURT.

Friday afternoon at 3 o'clock in Prof. Griffin's Room.
 Change of officers each week.

ILLINOIS CLUB COURT.

Saturday at 9 A. M. in Quiz Room.
 Chief Justice, J. G. Friedmeyer,
 Associate Justice, S. A. Niebuhr,
 Clerk, C. O. Spencer,
 Sheriff, H. J. Slagle.

INDIANA CLUB COURT.

Monday evening at 7 o'clock in Room 10.
 Supreme Judge, C. Bretz,
 Clerk, J. A. Titzworth,
 Prosecuting Attorney, W. D. Norton,
 Sheriff, D. E. Storms.

IOWA CLUB COURT.

Friday evening at 7:30 in Room 10.
 Chief Justice, A. W. Morris,
 Assistant Justice, S. T. Mears,
 Clerk, P. V. Fennelly,
 Sheriff, S. E. McMahon.

KANSAS CLUB COURT.

Thursday evening at 7:30 in Room 10.
 Judge, E. P. Hotchkiss,
 Clerk, Otis E. Hungeate,
 Sheriff, J. M. Lamer.

KNOWLTON CLUB.

(In nature, law and social) meets at rooms of members every Friday evening.
 President, Peter Sharpe,
 Secretary and Treasury, C. E. Oliver.

MISSOURI CLUB COURT.

Monday evening at 7:30 in Prof. Griffin's Room.
 Judge, G. V. Berry,
 Clerk, Edwin Well,
 Sheriff, W. S. Holloway.

NEW YORK CLUB COURT.

Wednesday evening at 7:30 in Room 10.
 Judge, J. A. VanArsdale,
 Clerk, C. W. Estey,
 Sheriff, Wm. M. Findell,
 Crier, A. E. Sanderson.

OHIO CLUB COURT.

Thursday evening at 7:30 in the Quiz Room.
 Chief Justice, W. E. Young,
 First Associate, O. K. Friedman,
 Second Associate, O. I. Stauffer,
 Clerk, B. F. Brough,
 Sheriff, G. W. Belknap,
 Deputy Sheriff, O. E. Chadmon.

PACIFIC COAST CLUB COURT.

Saturday at 10 A. M. in Room 10.
 Judge, A. W. Gravelle,
 Assistant Judge, J. E. Roberts,
 Clerk, J. E. Young,
 Sheriff, O. B. Morris.

PENNSYLVANIA CLUB COURT.

Tuesday evening at 7:30 in Room 10.
 Chief Justice, J. A. Bolard,
 Associate Justice, B. F. Scanlon,
 Sheriff, Chas. E. Oliver,
 Clerk, H. W. Lung,
 Prosecuting Attorney, W. G. Wilson.

SOUTHERN CLUB COURT.

Chief Justice, D. W. Yancey,
 Associate Justice, W. A. Turner,
 Clerk, Albert Martin,
 Sheriff, H. J. Slagle.

WELLS CLUB COURT.

Friday at 4 P. M. in Prof. Griffin's Room.
 Judge, T. A. Morrin,
 Clerk, A. F. Wentworth.

TRANS-MISSISSIPPI CLUB COURT.

Thursday evening at 7:30 in Prof. Griffin's Room.
 Chief Justice, C. P. Dunbaugh,
 Associate Justice, Robert Anderson,
 Clerk, J. F. Webb,
 Sheriff, Peter Sharpe.

SUPREME COURT U. OF M.

Meets semi-monthly.
 Chief Justice, J. W. Browning,
 Associate Justices, W. A. Bither, J. H. Greenwood, Peter Sharpe, W. S. Steele, L. E. Storms,
 A. F. Wentworth, F. L. Grant, John J. Dawson.

CONLEY DEBATING CLUB.

Thursday afternoon in Prof. Griffin's Room.
 President, L. W. Jefferson,
 Secretary, A. J. Falkner.

MICHIGAN LAW JOURNAL.

VOL. I.

JUNE, 1892.

No. 5.

A SUGGESTION CONCERNING THE LAW OF INTER-STATE EXTRADITION.

PROFESSOR EDWIN F. CONELY.

While yet the nation was forming—indeed as early as 1643—the impolicy of the colonies' suffering themselves to become asylums for criminal refugees was seen and appreciated by the public men of the time. But, though continued efforts were made in the right direction and much was accomplished, the rendition of fugitives from justice remained, either legally or practically, a matter of comity for nearly a century and a half, or until the adoption of the Constitution of the United States. Then, made mandatory by the organic law of the Nation, inter-state extradition ceased to be subject to State control or dependent upon State consent.

The Constitution, Art. IV, Sec. 2, provides that a person charged in any State with treason, felony, or any other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

This provision is not self-executing. It does not prescribe:

1. The *authority* upon whom the demand shall be made.
2. The *form* of the demand.
3. The *method* of procedure.

The difficulty of enforcing it without the aid of appropriate legislation was discovered in 1791, through a demand made by Governor Mifflin of Pennsylvania, upon Governor Randolph of Virginia, for the rendition of an alleged fugitive criminal. Surrender having been refused, Governor Mifflin brought the matter to the attention of President Washington, who immediately submitted the subject of inter-state extradition to Congress for consideration and action. The result was the Act of 1793, now in force as sections 5278 and 5279 of the Revised Statutes.

These statutes provide that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has

fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from which the person so charged has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

The validity of this sort of legislation was sustained by the Supreme Court of the United States in *Prigg v. Commonwealth*, 16 Pet., 539; *Kentucky v. Dennison*, 24 How. 66, *Roberts v. Reilly*, 116 U. S., 80.

It may be considered as settled by the decisions of that tribunal:

1. That inter-state extradition is a constitutional principle.
2. That the practical application of it may be enforced by national authority; and,
3. That, in legislating upon it, Congress may prescribe:
 - (a.) The authority upon whom the demand shall be made.
 - (b.) The form of the demand.
 - (c.) The method of procedure.

The Act of 1793 covers points (a), (b) and (c), but if any part of the statute is invalid or unwise, it is that which requires that the demand shall be made upon the executive authority of the State into which the fugitive has fled:

1. Because the Governor of a State as such cannot be compelled to act as the ministerial officer of the United States.
2. Because, as the Governor may decline to act, with or without reason, the mandatory policy of the constitution is defeated.

Mr. Justice Story, in *Prigg v. Commonwealth*, expressed doubt concerning the constitutionality of that part of the Act of 1793 which conferred authority upon State officers, but in *Kentucky v. Dennison*, the Supreme Court held that the Governor of a State could act if he wished to do so, but could not be coerced.

This decision is sound, though it left the statute without positive force except as a rule of procedure.

Through the voluntary action of the Governors of the several States, and the efforts of fugitive criminals to avoid rendition, the National and State courts have had occasion to further construe the law of interstate extradition and the following may be considered as determined:

1. That the constitutional provision relative to the demand and surrender of fugitives from justice includes every offense made punishable by the law of the State in which it was committed.*

* *Kentucky v. Dennison*, 24 How. 66. *Ex parte Beggel*, 114 U. S. 642.

2. That the right to demand arrest and surrender implies the correlative duty to apprehend and deliver without reference to the policy or laws of the State to which the fugitive has fled.*

3. That, to be a fugitive from justice, in the extraditional sense, it is not necessary that the party charged should have fled to avoid prosecution anticipated or begun; but, simply, that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.†

4. That, in extradition proceedings, the guilt or innocence of the fugitive is not in question.

5. That objections to the forms of pleadings and process must be referred to the courts of the demanding State.‡

6. That the constitutional requirement, that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, applies to extradition proceedings.

7. That the Governor of a State in proceeding in a case of extradition, acts under National, not State authority.

From the foregoing it results that the Governor of the asylum State, in considering an application for the rendition of an alleged fugitive criminal, has but *three* questions before him, viz:

1. Does the showing made by the demanding State, in *form and authentication*, conform to the requirements of the laws of the United States?

2. Does it appear, from such showing, that the alleged fugitive is *charged* with having committed a crime within the demanding State?

3. Is the person charged, a *fugitive* from the justice of the demanding State, in the extraditional sense?

The *first* and *second* are questions of law, and are to be determined by the inspection of the requisition and accompanying papers.

The *third* is a question of fact, the affirmative of which may be established by oral testimony or by affidavit. For practical reasons, the latter course is usually followed, though the Constitution and the Statutes are silent as to the method of proof. The Governor may hear the person charged on the question, whether he is a fugitive, etc., but this is a matter of discretion.

With what has been stated kept well in mind, the duty of the Governor of the asylum State, in a case of interstate extradition, is simple, clear, and of easy performance.

But, unfortunately, through ignorance of the law, or through failure to comprehend or appreciate its broad, national policy, or, through a spirit of particularism, Governors of asylum States have not infrequently enter-

* Kentucky v. Dennison, 24 How. 66.

† Roberts v. Reilly, 116 U. S. 80.

‡ Ex parte Beggel, 114 U. S. 642.

tained the opinion that, in extradition cases, they act as representatives of the State, rather than of the Nation, and have exercised powers not conferred by the Constitution and laws of the United States.

In thus acting without the scope of National authority, Governors of asylum States have assumed to consider and determine:

1. Whether the person charged, etc., had committed an offense in the demanding State?

2. Whether the requisition of the demanding State was made in good faith?

That a Governor upon whom a demand is made, rarely, if ever, directly and openly proceeds to try the question of guilt or innocence, is quite true; but that he, often, indirectly assumes the function of the trial court by investigating and determining whether the acts charged constitute an offense under the laws of the demanding State, or, whether such acts show a completed offense in that or some other State, is equally true.

This is usually done under the guise of solving the question, whether the person charged was within the demanding State when—as it is put—the *crime* was committed, instead of—as it should be put—the *acts which are alleged to constitute the crime*, were committed.

It is also true,—and that it is, is to be regretted—that Governors of asylum States, with indubitable evidence before them of the rectitude of the extradition proceeding, nevertheless presume to question its good faith.

A recent instance will serve as an illustration.

The agent of the demanding State presented to the Governor of the asylum State a requisition for the arrest and surrender of the fugitive, together with the indictment of the grand jury of the county in which the offense was perpetrated, duly charging the accused with having committed a crime against the laws of the demanding State; the affidavit of the complaining witness, a reputable citizen, showing that at the time the acts alleged to constitute the crime were committed the accused was bodily—not constructively—at the place of their commission and within the territorial limits of the demanding State, that he had left that State and had taken refuge in the State upon whose Governor the requisition was made, and that the proceedings against him were instituted and prosecuted in good faith and for no private end; and the affidavit of the official prosecutor of the demanding State—a lawyer of more than local reputation and a gentleman whose personal and official integrity would be put beyond question by the mere mention of his name—and the deposition of his assistant—less known, but an able and honorable member of the profession—showing that not only had the indictment been found and the requisition made without design or expectation of furthering selfish ends, but also that their use for any purpose other than the vindication of the *public* justice of the demanding State would not be tolerated.

All this was approved and authenticated, according to law, by the demanding Governor, under the Great Seal of his State, and, after careful

examination, pronounced legally unassailable by the Attorney General of the asylum State.

In the face of this, of the constitutional mandate that full faith and credit shall be given in each State to the judicial proceedings of every other State, and of the admission of the fugitive that he was in the demanding State when the acts charged against him were committed, the Governor upon whom the demand was made, on the interested testimony of the fugitive and his friends, held:

1. That the accused was not guilty of violating the laws of the demanding State; and,

2. That the requisition was made in bad faith!

As there is no appeal from such a determination, would it not be well to relieve the impotency of the present law of inter-state extradition by conferring upon the National Courts exclusive authority to cause the arrest and surrender?

TESTAMENTARY PROMISES TO PAY.

PROFESSOR NATHAN ABBOTT.

The *New York Law Journal* for May 23, 1892, contains a suggestive editorial headed "A Will or Not a Will," in which the writer says "Interesting questions are constantly arising in the classification of instruments which, although expressing wishes or intentions to be carried out after death, are open to criticism on the score of testamentary execution." As is intimated by the writer, the difficulty of placing an instrument in either the class of contracts or wills is considerably diminished if the statutory provisions as to execution of wills are elaborate. Where holographic wills are allowed, or wills of personal property require no witnesses or no signature of the testator, the question of whether a promise to pay may be a good testament or a valid obligation is not uncommon. In this connection it is well enough to remark that a writing good as a testament at the time when passed upon might not be good to-day in the same court, by reason of change in the formalities required in executing a testament, and for this reason the dates are given when cases referred to in this article were decided. The ecclesiastical law, which required no particular form in the writing or executing of a will of personalty, nor even a signature where prevented by act of God, is true in this country save where modified by statute. 1 Waerner on Adm., § 38; 1 Redfield Wills, Ch. VI, Sec. 1 §§ 1-11; *Masterman v. Maberly*, 2 Hag. Eccl. 235, 247 (1829). But while the possibility of uncertainty has been reduced materially, at least three interesting cases have arisen lately involving the question of whether certain writings were testamentary or not. These are referred to in the above editorial, and of them the two first are *Re Richardson's Estate* (29 Pac. Repr., 484), where the instrument was a letter and the question was whether it might be probated as a holographic will, and *Robinson v. Brewster* (30 N. E. Repr., 683) where the same question arose as to a deed. In the latter case, as the writing is brief, it is given in full:

KNOW ALL MEN BY THESE PRESENTS, that I, Joseph Robinson, for the consideration of one dollar, to me in hand paid, as well as my affection, do hereby assign and set over to my daughter, Eliza Jane Brewster, all of my property, both personal and real, to have the same after my death.

Witness my hand and seal this 7th day of May, 1877.

Attest: J. S. POST,
E. McCLELLAN.

His
JOSEPH X ROBINSON. [SEAL]
Mark

This was admitted to probate as a will. The last case of the three cases referred to is in the nature of a promise to pay, or a promissory note, to take effect after death of the maker, and a discussion of this class of

cases will be the object of this article. The case is *Hegeman v. Moon*, decided by the New York Court of Appeals in March, 1892 (30 N. E. Repr., 487), and the court had before it a paper in this form:

\$1,976.90.

BROOKLYN, February 8, 1871.

One year after my death I hereby direct my executors to pay to Joseph Hegeman, his heirs, executors, or assigns, the sum of nineteen hundred and seventy-six dollars and ninety cents, being the balance due him for cash advanced at various times by him to Adrian Hegeman, my son, and others, as per statement rendered by him this day, without interest.

CORNELIA W. HEGEMAN.

This, though testamentary in form, was held to be a promissory note in effect.

That an instrument in form is a note, check or indorsement will not prevent its operating as a testament is illustrated by several cases. In *Chaworth v. Beech* 4, Ves. Jr., 555 (1799), the deceased had indorsed on a bank note:

1791, June 13th. I give this note unto Sarah Hawksley, which is along with me for the love and regard I have for her.

GEORGE CHAWORTH.

Witness: JOHN BURTON.

The note so indorsed having been delivered to Sarah Hawksley by Chaworth, after his death she brought suit as indorsee and the writing was declared testamentary. In another suit against Chaworth's executor for an accounting it was said that the writing might have been proved as a will. In *Bartholomew v. Henley*, 3 Phillim. 317 (1820), deceased had drawn several checks payable to the order of a young woman with whom he was living, and in whose favor he had made his will. On the stubs of the checks were entries substantially alike. One such entry was as follows:

2808. Jan. 16, 1817.

I give this check to Miss Eyre for fear anything should happen to me before I can make a codicil to my will. £250.

It was held that the checks and indorsement on the stubs together were testamentary and could be probated as codicils to the will.

In *Hunt v. Hunt*, 4 N. H., 434 (1828), is an illustration of an indorsement of a note that was admitted to probate. The note and indorsement were as follows:

\$1,000.

BRATTLEBORO, April 28, 1813.

For value received I promise to pay Arad Hunt or his order, one thousand dollars, within one year from this date, and interest.

LUTHER WELD.

Attest: JONATHAN HUNT.

If I am not living at the time this note is paid, I order the contents to be paid to Arad Hunt, 2d. Witness,

ARAD HUNT.

Somewhat resembling the last case is *Schad's Appeal*, 88 Pa., 111 (1878), in which the writing construed was as follows:

PITTSBURGH, December 11, 1875.

I, Conrad Schad, husband of Margaretta Schad, have insured my life with the Knickerbocker Company, in New York, for four thousand dollars (\$4,000). I, Conrad Schad, assign the whole amount, \$4,000, to my wife, Margaretta Schad, after my death, when she can do with it according to her best will, without partiality toward her children. This I have written with good sound mind and set my name to it. CONRAD SCHAD.

This was held testamentary. It is to be noted in this case that the assignor retained the policy in his possession. Three years later, in *Fosselman v. Elder*, 98 Pa., 159 (1881), an interesting case came before the Court on the following facts. The deceased, Elizabeth Fosselman, had left a will, and among her effects was found a sealed envelope addressed by her: "Dear Bella, this is for you to open." It was opened by a niece of the deceased named Isabella, who was a legatee in the will, and was found to contain a promissory note for \$2,000, payable to the order of the deceased, and the following letter:

LEWISTON, October 2, 1879.

My wish is for you to draw this 2,000 dollars for your own use, should I die sudden.

ELIZABETH FOSSELMAN.

It was held that the "you" of the letter might be shown to mean the "Bella" of the address, and that "Bella" might be shown to be "Isabella," who was the niece named in the will of the deceased, and the note, letter and address on the envelope were probated as a codicil of Miss Fosselman's will.*

Contrasted with these cases, and illustrating the principle that such instruments as the above would not be entitled to probate if not executed in due form, are the cases of *Gough v. Findon*, 7 Wels. H. & G. 48 (1851), and *Mitchell v. Smith*, 4 De G. J. & S. 422 (1864). In *Gough v. Findon*, one Clarke had made two notes of £400 and £200, respectively, in favor of Sarah Gough, who, at the time, was and for a long time had been his servant. After Clarke's death his executors found two letters directed to "Sarah Gough, my late servant." One of the letters held the note for £200 and stated, "In addition to anything I may owe you, I enclose you 200 l. as a mark of my respect." The other letter, enclosing the note for £400 stated it to be for her "long and faithful services." It was held that these writings were not entitled to probate as they were not executed in accordance with the Statute of Wills. (1 Vict., passed after the date of *Bartholomew v. Henley*). In the case of *Mitchell v. Smith*, one Joseph Patterson put three notes in the hands of his nephew, Simon Smith, saying; "I give you these notes," adding "that Smith should have them after his (Patterson's) death but that he (Patterson) would like to be master of them as long as he lived." Smith said they required indorsing, and Patterson indorsed them as follows:

* Cf. *Fickle v. Snapp*, 97 Ind., 289 (1884). In this case notes folded up with and referred to in a will were made a part of the will.

24th September, 1857.

I bequeath—pay the within contents to Simon Smith, or his order, at my death.

His
JOSEPH X PATTERSON.
mark.

Witness: STEPHEN TEAL.

It was held that this endorsement was testamentary in tenor, but not executed in due form so as to be entitled to probate. If it had been witnessed by a sufficient number of witnesses the decision on this point would have been different.

There are several cases to the same effect in this country. In the case of *Moore v. Stephens*, 97 Ind., 271 (1884), Mrs. Manning made the following writing:

At my death, my estate shall pay to the treasurer of the Benevolent Friend Society of the White River Annual Conference and Church of the United Brethren in Christ, the sum of two hundred dollars, the interest of which is to be used for the benefit of superannuated and worn-out preachers of the White River Conference.

Given this third day of May, A. D. 1869.

My
ELIZABETH X MANNING.
mark.

Witness: L. K. MANNING.

This was said to be testamentary in character, but not duly executed. Nor was it allowed as a valid claim against her estate, on the ground referred to in the next case, a point to be commented on in connection with the question of whether such writings are good as obligations. In *Cover v. Stem*, 67 Md., 449 (1887), the deceased had written as follows:

Md. September 4, 1884.

At my death, my estate, or my executors, pay to July Ann Cover 3,000 dollars.

DAVID ENGEL, of P. [SEAL.]

Witness: COLUMBUS COVER.

Unhappily the law of Maryland, as to attesting testaments, had been changed in 1887, and for lack of two witnesses this could not be proved as a testament. Nor was it sufficient as an obligation to pay, for the reason to be referred to later.

All of the foregoing decisions are helpful on the other side of the question involved. If the instrument be not valid as a testament is it an obligation that may be enforced against the estate of the deceased, whether as a promissory note, or obligation of some sort?

In order to decide this regard must be had to several things. Apart from the question of intent which is involved in both questions, it is necessary at the outset to decide whether the writing was delivered.* Thus in *Gough v. Fendon*, *supra*, the court held that the writings were invalid as notes, being testamentary in intention, and to be delivered after the maker's death. And in *Mitchell v. Smith*, *supra*, the reservation by Patterson that he "would like to be master of (the notes) as long as he

* See *Clarke v. LeJourney*, 17 Conn. 511 (1846) where deceased had indorsed but not delivered a note payable to his order. The indorsement by the executrix did not pass title.

lived" rendered the indorsement ineffectual. On this point the court said, "In order to render the indorsement and delivery of a promissory note effectual they must be such as to enable the indorsee himself to endorse and negotiate the note." The matter of delivery is illustrated further in cases later to be referred to.

But in addition to making and delivering the instrument the relation of debtor and creditor must be created and subsist in the lifetime of the parties to the instrument, though the time of payment may be deferred until after the death of the maker. *Cover v. Stem*, 67 Md., 449 (1887); *Moore v. Stephens*, 97 Md., 271 (1884).

This relation of debtor and creditor should be more than nominal, it should be founded on sufficient consideration. The matter of consideration, as well as the subject as a whole, is well illustrated in the following cases: In *Holley v. Adams*, 16 Vt., 206 (1844) Adams during his last sickness made a gift to his daughter of a note in form following:

For value received, and for the consideration of love and affection that I have towards Minerva Holley, I promise and agree that she shall have and receive out of my estate fourteen hundred dollars, to be paid to the said Minerva Holley or her heirs after my disease.

BRISTOL, March 16, 1841.

RILEY ADAMS.

Although given during his last sickness it was not given under conditions that made it a valid gift *mortis causa*. And the mere consideration of love and affection, in absence of evidence of any other consideration, did not make the note valid as a claim against the estate. It also was declared invalid as a testament.

In 1871, the case of *Dean v. Carruth*, 108 Mass., 242, was decided on interesting facts. It appears that a Mr. West was a friend of a Mrs. Dean, previously Mrs. Jane I. Baylies. He occasionally made her gifts: "as for instance of a coal scuttle and a picture of Faith, the former at Christmas." She, on the other hand, entertained him at supper Sunday evenings and rendered him some slight services. At one time he sent her a sealed envelope addressed, "Mrs. Jane I. Baylies: I do not wish you to open this until my decease."

S. C. W.

Mrs. Dean retained this unopened until after the death of West, then opened it and found within a sheet of paper on which was the following:

TAUNTON, August 15, 1857.

For value received I promise to pay Mrs. Jane I. Baylies, five hundred dollars, on demand.

SAMUEL C. WEST.

Witness, A. E. SWASEY.

DEAR JANE: Please accept the above from your true friend.

S. C. W.

In a suit on the note against West's administrator to which suit the defence was want of consideration, the jury found for the payee. On appeal the court said, "If the jury were satisfied, upon the whole case, including the note itself, that it was given in payment for services ren-

dered however disproportionate in value their verdict was right. Inadequacy of consideration without fraud is no defence."

Eight years later the case of *Warren v. Durfee* (126 Mass., 338) was decided by the court that decided *Dean v. Carruth*, on the following facts: the plaintiff, Miss Warren and James F. Westgate were engaged to be married. He was ill with heart disease. During their engagement she had cared for him in his illness and had bought and mended some articles of his wearing apparel. After a violent attack of his disease he wrote the following note:

\$15,000.

FALL RIVER, December 11, 1875.

On demand after date I promise to pay to the order of Lydia B. Warren fifteen thousand dollars, value received, payable after death.

JAMES F. WESTGATE.

This note was sealed up in an envelope, and when he gave it to her he said, "there was something which would provide for her in case anything should happen to him, that if they were married, and he wanted it given up, he should expect her to give it up." To this she assented. She received and retained the note in her possession until after the death of Westgate. Miss Warren claimed that her promise of a speedy marriage, and her services to Westgate were sufficient consideration for the note. But the court said the case was not like *Dean v. Carruth*, because the note was not delivered by Westgate absolutely, but conditionally and as a gift out of his estate, and because it was without consideration. It also was said not to be valid as a gift *mortis causa*, and not well executed as a testament. It is hard to reconcile the decision as to consideration with *Dean v. Carruth*. The delivery seems to have been absolute, the giver retaining the right to recall should he so elect in his life time.

With the cases in Massachusetts may be contrasted those in New York. In *Worth v. Case*, 42 N. Y., 362 (1870) it appears that one T. B. Worth had been ill and his sister Mary C. had taken care of him. He afterwards gave her a sealed envelope on which he had written, "Mary C. Worth: this is not to be unsealed while I live, and returned to me any time I may wish it, T B. Worth," and in which he had placed the following note:

ADDISON, January 30, 1864.

I promise to pay my sister Mary C. Worth, on demand, ten thousand dollars in, consideration of services rendered.

T. B. WORTH.

Miss Worth retained the envelope and after her brother's death opened it and found the note. In a suit on the note, the jury made a special finding that her services were worth \$1,000. It was held by the court on appeal that the note was delivered and that the consideration was adequate to support the note. After referring to the facts the court say: "He (Worth) may well, at the time, have estimated her services and attentions as worth more to him than \$10,000. 'For all that a man hath will he give for his life.' It is true that in the manner of delivering

it (the note) to her, he reserved the *locus penitentie*, in case he should afterwards consider her services of less value to him; but he lived more than three years after that, and if his acts during that time are evidence of his opinion, he continued to believe, to the end of his life, that in giving the note for the consideration he had not committed a mistake. We have no primary standard by which we can measure or weigh their value to him." There was a dissenting opinion holding the note not delivered, nor intended to be operative, but that it was competent evidence of the value of the services.

In 1876 the case of *Earl v. Peck*, 69 N. Y., 596, was decided on facts of interest. One Dr. George Peck had taken a fatal dose of aconite. Before his death Mr. Peck made and delivered to Mary Earl the following note:

\$10,000. For value received, I promise to pay Mary Earl, for services rendered, ten thousand dollars.
 GEORGE PECK.

STANFORD, October 11, 1873.

In a suit on the note the payee claimed the note was in payment of services by her for six years as housekeeper, on an understanding with Dr. Peck that he would not pay her a definite sum, but "would pay her well." The court held the consideration to be adequate, saying: "If the intestate chose to pay for services rendered a much larger sum than they were worth, he had a right to do so. The note was not a gratuity or gift. There is no standard whereby courts can find the measure of value in such cases."

Cases of this sort are to be distinguished from *Carnwright v. Gray*, 127 N. Y., 92 (1891), in which the note was as follows:

QUARRYVILLE, September 2, 1871.

Thirty days after date, I promise to pay to Cornelius Carnwright fifteen hundred dollars, with interest.
 SAMUEL P. FRELIGH.

In this case the question was as to the effect on the note of the time of payment, and the court said: "The fact that it was payable after the death of the maker does not affect its character (3 Kent's Com., 76.)" Such a writing might be a good holographic will, (cf. *Re Richardson's Estate*, 20 Pacific Reporter) but the testamentary intent would need to be shown and that it was revocable; see *Bristol v. Warner*, 19 Conn., 7(1848.)

It is obvious that the adequacy of consideration of such notes as in *Warren v. Durfee* or in *Bartholomew v. Henley* can be inquired into by creditors of the deceased maker's estate. And that undue influence could be set up by parties in interest. The danger of letting such instruments stand as notes or testaments is well expressed by the court in *Helley v. Adams*, 16 Vt., 206 (1844), *supra*, when, after declaring the note of the father given to his daughter void for want of consideration and invalid as a gift *mortis causa*, it said: "To hold differently, we think, would establish a very dangerous doctrine, and one that would overturn our whole system of *testamentary disposition* of estates. It might in some cases put whole estates at the mercy of a few interested individuals who happen to

have access to and who have gained the confidence of the dying man, and the transaction would be disencumbered of all the statutory checks which the law has thrown around the disposition of property by will—there being no witnesses required, and there being no tribunal instituted by law for the purpose of testing its validity after the decease of the donor.”

If a party in interest, as an executor of the maker's will or administrator of his estate, is sued by the payee of a note given under circumstances of fraud, he may obtain an injunction to restrain the suit, and on cause shown may have a decree ordering the note given up to be cancelled. See *Esdaile v. La Nauze*, 1 Y. and Col., 394; S. C. 4 L. J. (N. S.) Ex. Eq. 46. This principle is illustrated in the case of *Dent v. Bennett*, reported in 5 L. J. (N. S.) Eq., 58 (1835), and in 8 L. J. (N. S.) Eq., 125 (1839). In this case Jonathan Dent, being infirm and in his eighty-sixth year, made the following agreement with his physician, Lucas Bennett:

Whereas the said Lucas Bennett does hereby promise and agree that he will, at all times when required, diligently and faithfully give his medical and surgical attendance to the aforesaid Jonathan Dent for and during the remainder of his life; and the said Jonathan Dent, in consideration thereof and out of gratitude and respect to his friend, the said Lucas Bennett, for past services and for having saved his life when in the greatest danger, does hereby promise and agree that the said Lucas Bennett shall be fully entitled to the sum £25,000 at the said Jonathan Dent's decease.

The agreement also directed that sum of money to be paid by Dent's executors out of his personal estate, within six months from his decease, independent of any will the said Dent had then made or might make after the date of the agreement. Mr. Dent died four years after making the agreement, and Bennett brought a suit at law against his executors to enforce it. The executors brought a bill in equity to restrain proceedings at law. As a result of these actions he was enjoined from proceeding at law and the agreement was ordered to be delivered up to be cancelled. It was said that the agreement was one the influence of which would be “to accelerate the death on which the surgeon is to have £25,000,” and to be intrinsically of such a character as to be “totally void in point of law.” The court being satisfied it was made without adequate consideration, it was held invalid on that ground. A case somewhat resembling *Dent v. Bennett* is *Allen v. Davis*, 20 L. J. (N. S.) Eq., 44 (1850).

In conclusion it may be said that whether an ambiguous instrument is testamentary or a promise binding the estate of the maker is a matter of intention rather than form, except as to the execution of the instrument; that delivery of the instrument or retaining control over it with power of revocation is of importance in determining the intention of the maker. If the instrument in form is a promise to pay, did the maker intend to create the relation of debtor and creditor. If so, was the promise for sufficient consideration and was the act completed by delivery.

COMMUNICATION OF ACCIDENTAL FIRES.

McNALLY V. COLWELL.

Michigan Supreme Court, May 13, 1892.

1. Although a fire is carefully set and maintained within ones own building in the management of a lawful business, and all proper precaution is taken to prevent its escape, it is still the duty of the owner of the building in case fire does occur or escape by accident, where the nature of the business is such that fires are liable to originate and spread rapidly when once ignited, to provide means for extinguishing the flames and prevent their spreading to other property.

2. In the operation of mills where fires are liable to originate in engine and boiler rooms, and the construction of the mill is such that the surroundings are inflammable, so that the fire is liable to spread rapidly when once ignited, it is incumbent upon the person operating the mill to take care that the fire should not consume the mill and spread to other property, by keeping on hand not only persons to watch the fire and keep it within the furnace, but some appliances for extinguishing the fire in case it should accidentally escape and ignite some part of the building.

3. It is error to submit the question to the jury whether the defendant was negligent in knowingly employing an engineer and fireman in the mill who were incompetent to perform their duties by reason of their use of intoxicating liquors, when it was not shown that the use of such intoxicating liquors had any bearing whatever upon the origin of the fire, or to have had anything to do towards preventing its extinction.

MORSE, C. J.—Plaintiff sued to recover for the value of certain pine lumber alleged to have been destroyed by fire through the negligence of the defendant.

The plaintiff had verdict and judgment for \$2,636.

Colwell owned the only saw-mill in Harrisville, Alcona county, Michigan, and the lumber burned was piled on the docks that ran from the mill out into the lake. The lumber was sawed and piled upon the docks by Colwell from logs owned by plaintiff, Colwell receiving a certain sum per thousand feet for sawing and piling. The lumber was on the docks awaiting shipment.

The fire originated in the boiler-room of defendant's mill. A strong wind was blowing at the time from the direction of the mill towards the lumber. The mill was burned and the fire spreading therefrom consumed the docks and lumber upon them. No fault was found with the construction of the boiler-room, and the question of defendant's negligence was submitted to the jury upon two points: *First*, was the defendant negligent in knowingly employing an engineer and fireman in the mill who were incompetent to perform their duties by reason of the use of intoxicating liquors? *Second*, was the defendant negligent in not having the proper appliances in the mill for putting out fires that might arise there? At the close of the direct evidence on the part of the plaintiff, defendant's counsel moved for a direction to the jury to find a verdict for the defendant. This the court refused, and, at the end of the trial, submitted the case to the jury upon the two propositions stated above.

The court was in error in submitting the first question to the jury. There was testimony tending to show that the engineer and firemen were in the habit of using intoxicating liquors, and were sometimes seen under the influence of such liquors, but such liquor habit or occasional intoxication was not shown to have had any bearing whatever upon the origin of the fire or to have had anything to do towards preventing its extinction. In the case of *Cowley v. Colwell*, which was argued in this court in connection with this case, and which was an action for lumber destroyed by this same fire, the Circuit Judge correctly, as we think, upon nearly if not identically the same evidence as in this case, withdrew this question of the use of intoxicating liquors by these employees of the defendant from the jury. It should have been withdrawn in this case.

In the boiler room of defendant's mill there was a water tank about six feet high and five or six feet in diameter, filled with water from a pond which came up to the westerly end of the mill. The tank was supplied by a pipe leading from the pond, and there was sufficient head to keep it constantly filled. On the northerly side of the saw mill was a grist mill, run by water, and the sluice for waste water ran between the two mills. There was also a sluice for the waste water of the mill pond, which ran directly through the lower part of the saw mill. The water was conveyed in a box about three feet wide by two feet deep, which stream of water was running through the mill at the time of the fire. At the time of the fire there was four or five pails in the mill and one in the boiler room, sitting under a faucet in the tank. There was no pump in the mill, nor any hose at the time of the fire, although hose had been in use before that time for wetting down the boiler room, but had become worn and useless.

The contention of plaintiffs on the trial was that there should have been a pony pump and sufficient hose in the boiler room to throw water upon the walls, and that if there had been the fire could have been extinguished when first discovered. The declaration averred negligence in this regard, and that the defendant "did not keep upon said premises any hose or pails, or barrels of water or axes or the like, whereby on the day and year aforesaid (July 6, 1888), a fire having broken out upon said premises, and there being no means of extinguishing the same, the fire was communicated to the said lumber of the plaintiff, and the same was wholly lost and destroyed."

This is a peculiar case. No negligence is charged in the origin of the fire, but the defendant is sought to be held liable because he neglected to keep upon his premises proper and sufficient appliances to prevent the spread of an accidental fire, starting upon his premises and within the enclosure of his boiler room in his mill. Nearly all of the cases found in the books have arisen from negligent fires communicated from sparks from locomotives and steamboat smoke stacks, or from manufacturing chimneys, or from fires set out in the open air upon the premises of the owner and escaping therefrom.

The question here is a new and novel one to me. If there is any liability here from what duty does it arise; and what is the extent of the duty, if there be one, of the owner of a house, barn, store, mill or other building, who has taken every and all necessary precaution to prevent the breaking out of a fire within the building, to keep in such building appliances for extinguishing fires, and to prevent its spreading to the property of others? Does the same rule apply to a mill that would govern the case of a store, barn or dwelling house, and if not, why not?

The Circuit Judge instructed the jury that the defendant, in reference to the property of the plaintiff, was bound to exercise such care, and no more, to prevent the destruction of the same by fire as a man of ordinary prudence and caution, under all the circumstances, would exercise in reference to property similarly situated, of the same kind and character, belonging to himself; that he was not obliged as a matter of law to have a pony pump or hose in his mill, he could have pails if he saw fit, provided the jury found that pails would so protect from the spread of fire that an ordinarily prudent man would have used them under like circumstances.

The claim that defendant ought to have had a pony pump upon his premises should not have been permitted under the pleadings, as there was no allegation in the declaration that it was the duty of defendant to have such a pump or that he was negligent in not having it; nor do I think that he was obliged to have and keep hose in the mill under the circumstances of its situation and surroundings.

After much research I have been unable to find a case at all like the present, or anything in the text books bearing directly on the question involved here. If a fire is carefully set and maintained within ones own building in the management of a lawful business, and all proper precaution taken to prevent its escape, what is the duty of the owner of the building, in case fire does not occur, or escape by accident, as to keeping on hand, within the building, appliances to prevent the spread of such fire, and to extinguish it?

Under the old common law of England one whose house or building was burned by accident was liable for the destruction of his neighbors property caused from fire communicated from such burning house or building. This rule was so manifestly unjust that, in 1707, Parliament passed an act, providing that no action shall be maintained "against any person in whose house or chamber any fire shall accidentally begin." 6 Anne C., 31, par. 67.

This statute being enacted before the separation of the colonies from the mother country is generally accepted as a part of our common law. In 1774, this statute was extended to fires originating in a "stable, barn or other building," or on the estate of any person. 14 Geo. 3rd, C. 78, par. 86. This last statute is not so generally accepted as part of the common law of this country by our courts.

It is said in *Sheaman and Redfield on Negligence* that both of these statutes are part of our common law; (4th ed., section 665) but it is held in some of the States that the latter statute, being passed on the eve of our revolution, never became a part of our common law. *Spaulding vs. C. & N. W. Ry. Co.*, 30 Wis., 110.

These statutes, however, have generally been held to relieve the owner of real property from the consequences of the spread of fire from his premises only in cases where the fire results from pure accident, free from any culpable negligence. *Sheaman & Redfield, Neg. Sec. 665*, (4th ed.).

I am satisfied that in case of a dwelling house or chamber, that there could be no liability against the owner for property destroyed by a fire accidentally and without negligence, beginning in such dwelling house, because, in the opinion of a jury, he did not keep on hand at all times proper appliances to put out a fire, in case one should accidentally arise. And the same rule would apply to stables, barns and out buildings where fire was not kept for the purpose of manufacturing, but for domestic uses. But I am inclined to think that there is a difference between fires kept in a house or other building for domestic purposes, and fires for the generation of steam to run machinery, or in blast and other furnaces used for manufacturing purposes.

The care to be used must always be in proportion to the risk involved. If properly and carefully set and managed the breaking out of fire in dwelling houses and buildings used for domestic purposes, is an uncommon occurrence, and one not to be generally expected; but in the use of fire for manufacturing purposes the risk is very great, and constant care is required to prevent its escape, and accidental fires are frequent.

If, therefore, fires are liable to originate in engine and boiler rooms, and the construction of the mill is such that the surroundings are inflammable, so that the fire is liable to spread rapidly when once ignited, it would be incumbent upon the person operating the mill to take care that the fire should not consume the mill and spread to other property, by keeping on hand not only persons to watch the fire and keep it within the furnace, but some appliances for extinguishing fire in case it should accidentally escape and ignite some part of the building. The fire in the boiler or engine room should not only be well guarded to prevent accidental fires, but some provisions ought to be made to prevent such fires spreading, and to extinguish them. This would suggest itself, it seems to me, to an ordinarily prudent man in the care of his own property.

"The careful setting and keeping of fire in ones dwelling house, shop, field or elsewhere, for a useful purpose, creates no liability to another injured by its spreading through some accident not readily to be anticipated. But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor's property and destroys it, will give the neighbor an action for the damages." *Bishop on Contract Law*, Sec. 833.

Could this fire in the boiler-room of defendant be said to be well kept and guarded unless some appliances were there for the purpose of speedily extinguishing accidental fires in such room? I think not. And, if any means or appliances for such purpose were required, then they must be such as an ordinarily prudent man would have provided under like circumstances.

The nearest case to the present that I have been able to find is that of *Hauch v. Hernandez et al*, 41 La Ann, 992. In that case, fire was communicated from a porcelain factory to the saw-mill of plaintiff, destroying it. Held that the owner of the factory was liable.

The furnace and kiln of the factory were well constructed of the best materials. The equipments for extinguishing fires were about the premises, though it was shown in the proofs that part of them were out of order. The court said that the defendant in the construction of their works seem to have done all that was required and necessary for the protection of their own and their neighbors' property. It was shown that there were partitions built of dry pine lumber not far from the walls of the kiln. It was also shown that the greatest care and watchfulness was required about the kiln from the time of ceasing of the feeding of the fires, when the mouths of furnace are closed and the heat is at its intensity, until it is the cooled.

Upon the day of the fire, after the furnace doors were closed, the watchmen left the building. This was held to be negligence. The fire evidently originated from the heat of the kiln igniting the pine partition. The fire broke out in this wood work about ten feet from the kiln and was caused by the excessive heat from the kiln. It is said that it was the duty of the defendants to have the kiln and furnace guarded by experienced employees during this critical time of intense heat, but the proofs showed an abandonment of the premises by the watchmen, which was negligence. If the abandonment of the premises by the watchmen at the time was negligence, would it not also have been negligence if the watchmen had remained at their posts but been provided with no means of extinguishing a fire which was likely to occur from the action of the heat upon this dry wood work?

So in the case of a saw-mill, like the one operated by defendant in the case before us, where it is reasonably to be anticipated that fires may break out, ought there not to be some appliances to put them out? It is clear to me that to operate such a mill without any such appliances or any means at all to extinguish fires would be negligence as a matter of law. And if means are provided they should be such as an ordinarily prudent man would use, having due regard to the safety of his own property and that of his neighbors, and considering the situation and surroundings of his mill.

The court, therefore, did not err in refusing to direct a verdict for the defendant. The plaintiff was permitted to show that the usual means employed in saw-mills at Au Sable was by using the water-works and

keeping hose, and in Springport and Greenbush that they had a "pail brigade." This was error. The defendant's liability in any event could not be governed by the practice in other mills at other places necessarily under different conditions and surroundings, nor would it in my opinion be competent to show how another mill, if situated exactly as this one was, was equipped and protected against fire. There is nothing so uncommon about the knowledge of the spread of fire, or the construction of a mill like this one, as to warrant expert evidence as to what means an ordinarily prudent man would take to prevent the spreading of fire in such a mill to save his own property.

The jury upon being made acquainted with the construction of the saw mill, its location and surroundings, were competent to judge of the proper appliances to be used by an ordinarily careful man in the extinguishment of accidental fires liable to occur in this boiler room. What was done in this regard in other mills was irrelevant, and could have no effect other than to mislead the jury and prejudice the defendant's case.

A witness was allowed to testify that, in the same month and year of this fire, at the mills in the city of Alpena, as a rule, the appliances for fire protection were a force pump and hose, "and certainly barrels of water and pails would be needed." Witnesses were also permitted to give their opinions whether it would be safe to operate the engine room of defendant's mill without having any appliances, "any hose or other appliances, except possibly a couple of pails to put out fire."

As before said this was not a question for expert evidence, or opinion of witnesses. It does not require any special or particular knowledge beyond that presumably open to a jury in a lumbering country to determine what means would be safe or ordinarily prudent to be used to put out fires in a boiler room or mill like that of the defendants in this case. It is best to limit expert testimony to its proper uses; since it is not now held in the highest esteem; nor has it been found to be free from the infirmities and temptations that belong to human nature. And since a man's opinion cannot be met and tested, as could his testimony to the existence of a fact, expert evidence while useful in many cases is dangerous in all; and should be restricted for the purpose of accuracy in determining the truth, which is the aim of all judicial investigations, to those cases where its use is well nigh indispensable because of questions of science or skill, being involved, in which a special and peculiar knowledge is desired in order to arrive at the truth.

There was also error in permitting a witness to testify that one of the hangers in the boiler room of this mill was charred by fire in 1884 or 1885. Such fact had no possible legitimate bearing upon the issue, and its admission in evidence was to defendant's prejudice.

The judgment is reversed and a new trial granted with costs of this court to defendant.

The other justices concurred.

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE, Editor and Business Manager.

H. D. JEWELL,

Managing Editors.

ELI R. SUTTON.

ASSISTANT EDITORS.

**J. E. ROBERTS,
ARTHUR WEBSTER,**

**W. M. HARVEY,
O. B. VANHORN.**

Published monthly, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

The next examination of candidates for admission to the Bar before the Supreme Court will be held at Lansing, on Thursday afternoon, June 16. Quite a number of candidates for admission usually present themselves at the June examination, a large proportion of them being from this Law School. This year arrangements have been made so that those who do not desire to attend the Supreme Court examination, but who are admitted before Judge Kinne, in this county, may sign the roll of attorneys of the Supreme Court at County Clerk Brown's office, and by sending certificates of their admission to the Washtenaw Bar, to Chas. C. Hopkins, Clerk of the Supreme Court, they will receive certificates of admission to the Supreme Court.

As was announced in the April number, it has been decided to publish the JOURNAL twelve times a year. Those who have subscribed at the one dollar rate are entitled to the June number, but their subscription expires upon receipt of it. The remaining numbers of Volume I will be sent to those who are now on our subscription list at the one dollar rate, for \$1.50. Subscriptions may be left at any of the book stores in Ann Arbor or sent by mail to the "MICHIGAN LAW JOURNAL, Ann Arbor, Mich." The July number of the JOURNAL will appear earlier than usual and will contain the annual address to the students and alumni of the Law Department, which is to be delivered by Hon. Benjamin Butterworth. There will be other features that will make this number a valuable one to those who graduate. We trust that the students may appreciate fully the necessity of subscribing to the JOURNAL before departing from Ann Arbor.

THE next annual meeting of the Michigan State Bar Association will be held at Grand Rapids, on Tuesday, July 12. The meeting will conclude with an elaborate dinner. The following well-known lawyers have been

selected to prepare papers for the occasion: Judge J. W. Champlin, of Grand Rapids; Professor J. C. Knowlton, of Ann Arbor; George Durand, Esq., of Flint; A. J. Mills, Esq., of Kalamazoo; George Hayden, Esq., of Ishpeming; F. A. Nimms, Esq., of Muskegon, and Michael Brennan, Esq., of Detroit. The benefits to be derived from the National and State bar meetings cannot be over-estimated. Many of the papers and addresses read before them are gems of thought and learning. The organization should not stop at States; it should be continued by the organization of county associations.

CARRIERS LIMITING THEIR LIABILITY.—The able Chief Justice of the Supreme Court of Kansas, in his article upon "Limiting the Liabilities of Common Carriers," as it appeared in the May number of the *LAW JOURNAL*, contends, and apparently with abundant authority, that a common carrier may restrict its liability, even for ordinary negligence, by a provision in its receipt that in case of loss it will not be liable beyond a sum specified (\$50) unless the value of the consignment be marked upon the bill of lading. While admitting the Chief Justice's claim, that "when the shipper places his own valuation upon the property delivered to the carrier and the carrier thereupon makes his charges accordingly, there is no justice in allowing him to be paid a larger value for the property if loss occurs," issue may well be taken with the conclusions reached in the application of the doctrine, for it seems to confer an undue advantage upon the carrier. If the shipper "*places* his own valuation" upon the goods, all would be well, but as a matter of fact the carrier is usually the only party who knows what the limitation is, or perhaps even that there is a limitation. Under the rule that in the absence of fraud parol evidence may not be introduced to vary a written contract, it may be negligence in the shipper not to read the lengthy conditions in an iron-clad receipt, but it is a hard rule that the courts, and if necessary the Legislature, should modify.

In a large majority of cases, the shipper takes his consignment to the carrier's office, and delivers it for carriage without a thought of the contract into which he is entering. The carrier's receipt is seldom read, nor is it reasonable to require men in the hurry of active life to examine the minute details of a lengthy contract. By making the printed stipulation a part of the contract, and conclusive in the absence of fraud, the law not only permits the carrier to limit his liability but charges the shipper with a burden of evidence which he cannot sustain, however equitable his case might be.

In the language of Mr. Justice Bradley, in the *Lockwood Drovers' Pass* decision—language approvingly quoted by Justice Horton in his article—"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler and stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents, often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. * * * If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and

no concern of the public. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in part, control it, and impose such conditions upon travel and transportation as they see fit, which common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness."

The question did not arise in the New Hampshire cases cited by Chief Justice Horton, knowledge of the shippers being expressly found, but the supreme Court of Rhode Island has followed the decision of the Kansas bench in *Express Co. v. Toley*, 56 Ks., 458, and in courts which otherwise agree, a similar conclusion on this point would doubtless be reached. In *Express Co. v. Foley*, the receipt given the shipper contained the usual "value" column, but no figure or mark of any kind was made in it, and the court—Chief Justice Horton rendering the opinion—held that the shipper had adopted the \$50 limit of liability as contained in the printed condition. The case of *Express Co. v. Foley* was rightly decided, for other reasons, but it may be doubted whether this particular decision "rests upon fairness and reasonableness" such as should govern fiduciary relations.

It would seem equitable that as the limitation is for the benefit of the carrier and not of the shipper, the former should be held to show that the shipper *knowingly* agreed to it, or, rather, that the shipper should not be restricted in the amount of damages by a so-called representation which he never made and did not intend to adopt. The carrier might be allowed to refuse the goods unless the value was expressly mentioned and agreed to, but having accepted he should not be allowed to take advantage of the circumstances arising out of the relation in which he has an immense advantage over the shipper. The question of assent is pre-eminently one of fact, and the doctrine of estoppel should be admitted with extreme caution.

The decision reached in Rhode Island and Kansas illustrates the manner in which law is made by the courts, and the practical effect of giving the carrier the preference in cases where somebody must suffer because of a contract entered into, will go far to explain the popular discontent among the people, who reason from their own experience and not by legal formulas. It would increase confidence in our courts if the reasons for their decisions could more easily be justified by those who suffer by them, and in the long run common carriers would be the gainers.

G. E. M

Peabody, Kan.

NOTES AND COMMENTS.

MINGLING OF TRUST FUNDS BY EXECUTOR.—The decision in the case of *Smith v. Combs*, New Jersey, Chancery, April term, is an interesting and valuable one, containing as it does a discussion of the liability of an executor or administrator where the trust funds in his hands have been mingled with his private property, and rights of the *cestui que trust* in such a case. A portion of the syllabus of the decision is as follows:

"Where an executor mingles trust moneys with his own, or invests them in personal or real estate, his entire estate, either in his own hands or in the hands of his administrators, will be liable for the payment of such funds, in preference to his own creditors. In such case, in making payment of his own indebtedness, the presumption is that he disbursed his own moneys, and retained the moneys held in trust. In case of insolvency, the *cestui que trust* is entitled to be first paid.

GENERAL AND SPECIAL DEPOSITS.—In *Mutual Accident Association v. Jacobs*, Illinois Supreme Court, May 12, the distinction between general and special deposits was very ably discussed. The rights of the depositor are considerably curtailed by this decision, the court holding that he has no preference over any other creditor even though money has been delivered to the bank for a specific purpose, if it has been mingled with the funds of the bank. The decision will be read with considerable interest. The following is the syllabus of a report of the decision in the *Chicago Legal News*, May 20:

"There is a wide difference between a special and a general deposit, as these terms are understood, not only by bankers but by the public, who are transacting business daily with the banks. Where money of any description is deposited in a bank and the identical gold or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special. A deposit which is to be returned in kind, is a general deposit. Where the money which has been delivered to a bank, even though it be for some specified purpose, as for instance, investment in a mortgage security, has been mingled with the funds of the bank, there is no reason why the depositor should be preferred above any other creditor. In this case the money passed into the bank as a general deposit, and was mingled with the other funds of the bank and the depositor occupies the position of a general creditor."

EFFECT OF RESIDENCE UPON THE STATUTE OF LIMITATIONS.—The Statute of Limitations has been so thoroughly discussed in text-books, so implicitly laid down in the statute-books of every state, and so frequently interpreted by the courts, that it would seem almost impossible to conceive of a point in connection with the subject that has not been definitely settled. Now and then questions do arise, however, which are not conceded to have been entirely settled, and they frequently form the basis of

very interesting decisions. Such is the decision handed down by the Illinois appellate court, third district, in *Wooley v. Yarnell*. The facts and decision in the case is contained in the following syllabus of the case, which is reported in full in the *Chicago Legal News*, May 21:

"Plaintiff in error, residing in Illinois, made his note in 1869, to defendant in error, who resided in Massachusetts. Plaintiff in error continued to reside in Illinois till 1881, when he removed to New Hampshire, where he has since resided. The statute of limitations on notes in New Hampshire is five years, in Illinois at the time this suit was brought it was sixteen years. Pleas of both the New Hampshire and Illinois statutes of limitation were filed, and there was judgment against plaintiff in error for the amount of the note. The time of limitation in Illinois when this note became due was sixteen years. The plaintiff in error then lived in this State, and the cause of action then arose against him here. He removed to New Hampshire, and thus suspended the right of action in this State during his absence. But, when afterward sued in this State, he can not plead the bar of the statute of New Hampshire, the place of his present residence. During such absence from this State the right of action here was preserved in this State and can not be barred by the laws of another State."

MARRIAGE UNDER DURESS.—In *Sherman v. Sherman*, decided in the April term of the New York court of common pleas and reported in the *New York Law Journal*, May 12, a very nice question as to the validity of marriages performed under duress was discussed. The action was brought to obtain the annulment of the marriage of the parties, on the ground that, at the time of its contraction, plaintiff was deprived of the exercise of his free will and capacity to consent, by reason of his intoxication and the fear of imprisonment and bodily harm threatened to be inflicted upon him if he should fail to marry the defendant. It did not appear, however, that the defendant was cognizant of the duress under which the plaintiff was acting, but that it was occasioned by third persons, and of which defendant was ignorant. Under such circumstances the court refused to annul the marriage. In his decision Bischoff, J., says:

"To justify the annulment of the marriage, it should appear that plaintiff's duress was occasioned by the defendant, and that she uttered or instigated the threats of imprisonment or bodily harm, and was cognizant of them; or, at least, that at the time of the marriage ceremony she knew or had reason to believe that plaintiff was impelled to marry her by fear that the threats of imprisonment and bodily harm would be carried into execution if he did not marry her. These facts are denied by the answer and were not included among those determined by the jury in plaintiff's favor, and duress of the plaintiff occasioned by a third person, but of which defendant was wholly ignorant at the time of entering into the marriage contract, cannot be used as a means of setting that contract aside. The legal principles governing the authority of the Court to annul a marriage on the ground of duress of one of the parties thereto are essentially the same as those applied when the annulment of any other contract is requested upon the like ground, (*Bishop on Marriage and Divorce*, vol. 1, §210). To be available as a ground for relief it must appear that the duress of the party asking to be relieved was occasioned by the other contracting party, or that he knowingly used or availed himself of such duress as a means of procuring the contract sought to be annulled (*Wharton on Contracts*, vol. 1, §154; *Leake on Contracts*, 425)."

IMPLIED CONTRACT AS TO WAGES BETWEEN MASTER AND SERVANT.—The case of *Kennedy v. Murphy Iron Works*, Michigan Supreme Court, May 6, presented a novel question. The plaintiff was a core-maker by trade, but was employed by defendant's foreman as a helper on the core bench, at \$1.25 per day. About two weeks after his employment the regular core-maker was discharged, and plaintiff was asked by the foreman if he could make cores; upon replying in the affirmative he was put at that work, and told that he would receive a higher rate of wages. Upon the next pay day he received an envelope marked \$2.50 per day and containing his wages at that rate. He continued to work in that capacity four or five months and received his wages at that rate. The superintendent of the defendant company then claimed that there had been a mistake made in the payment of his wages, and refused to pay him for eighteen days work then due. In an action brought to recover plaintiff's wages for eighteen days at \$2.50 per day it was claimed in defense that as between defendant, or his foreman, and plaintiff, no rate was ever fixed; that the payment at the rate of \$2.50 was by mistake, and created no liability; that after the work was changed plaintiff could be allowed only what the work was worth, and that defendant was entitled to set off the over payment. The jury found for the plaintiff, the court having instructed them that if it was such a rate that the plaintiff would have reason to believe that a mistake had been made, then the company might off-set, as against his claim for the eighteen days, the difference between what his wages should be at a fair rate (inasmuch as there was no agreement as to the specific terms) after the promise to raise, and what he had actually been paid; but if it was not found so far in excess of a fair rate that he had reason to believe that a mistake had been made, the company could not, after having paid him on that basis several months, discontinue that rate. In affirming the decision of the court below, McGrath, J., said:

"Defendant's mistake cannot now be corrected at the expense or prejudice of the plaintiff who had in good faith acted and relied upon conduct in the line of what was promised. Plaintiff was entitled to a voice in the new rate. Other equities have intervened. Plaintiff cannot now be placed *in statu quo*, nor can he be driven to a recovery upon a *quantum meruit*. Relying upon defendant's act plaintiff has parted with his labor. Defendant's payment of the increased wages, following as it did a promise in that direction, naturally and directly indicated an intent, and having been acted upon in good faith by plaintiff, it must be given the same force and effect as actual intention."

LATE DECISIONS OF THE MICHIGAN SUPREME COURT.

REYNOLDS v. SCHAFFER.—*Decided May 6.*—(Morse, C. J.)

Criminal Conversation—Right of Wife to Testify for husband.—Under § 7546, How. Stat., a wife is not a competent witness for her husband in an action for criminal conversation. *Matthews v. Yerex*, 48 Mich., 361, followed.

SHERMAN v. HIGHWAY COMMISSIONER.—*Decided May 6.*—(Grant, J.)

Highways—Legality of Proceedings of Highway Commissioner in Laying Out Highways.—In proceedings of a highway commissioner, in laying out and opening a highway over certain lands, if the owner was not made a party to the proceedings, was not served with notice, and did not appear at the hearing and waive right to notice, the proceedings are void.

LYON v. SWEENEY.—*Decided May 6.*—(Long, J.)

Assumpsit—Claim for Foreclosing Mortgage—Submission to Jury.—A claim for services and expenses in foreclosing a mortgage may be properly submitted to a jury, when, though there was an understanding that plaintiff was to charge defendant nothing for loaning money and collecting interest, it does not appear that plaintiff was to be to the expense of foreclosure of mortgage.

ROOT v. KING, et al.—*Decided May 6.*—(Grant, J.)

Mortgage Sale—Conveyance of Real Estate—When Set Aside on Ground of Mistake.—One who has purchased certain lots at a mortgage sale under an honest mistake of fact, the mistake being as to situation and not as to the relative value of the lots will be entitled to have the sale set aside, and the mortgage foreclosed. A defendant who purchased with knowledge, and without consideration, stands in no better position than his grantee.

KENNEDY v. MURPHY IRON WORKS.—*Decided May 6.*—(McGrath, J.)

Master and Servant—Wages—Implied Contract.—An employee who has been promised a raise of wages, and has received a certain increased sum per day for several weeks, is entitled to presume that such sum was paid him in fulfillment of the promise, though there had been no definite agreement as to the amount he should receive, unless there was something in the amount received to excite inquiry and lead him to believe that a mistake had been made.

TUDHOPE v. POTTS.—*Decided May 6.*—(McGrath, J.)

Guardian and Ward—Right of Action by Ward against Surety on Guardian's Bond before Accounting.—A suit against a surety upon a deceased guardian's bond, brought by the ward after obtaining majority, is prematurely brought when there has been no accounting and no proceeding in equity to settle the rights of the parties to the controversy. (*Gott v. Culp*, 45 Mich., 265; *Chubb v. Bradley* 58 Mich., 266; *Welch v. Van Auken*, 76 Mich., 464; *Grady v. Hughes*, 80 Mich., 184, *Schlee v. Darrow Estate*, 65 Mich., 362, distinguished.)

MICHIGAN SHINGLE CO. v. L. & L. FIRE INSURANCE CO.—*Decided May 6.*—(Grant, J.)

Fire Insurance—When Breach of Warranty *in futuro* Vitiates Policy—Parole Evidence to Vary Terms of Contract.—A direct violation of the clear and explicit terms of a fire insurance policy will render the policy void. Where a warranty is not one *in presenti*, but *in futuro*, it is of no consequence whether the company's agent knew at the time of the issuance of the policy that plaintiff was violating the warranty. Parole evidence is incompetent to change the terms of a contract in which the intent of the parties is clearly expressed.

CHICAGO RUBBER CLOTHING CO. v. POWERS.—*Decided May 6.*—(Long, J.)

Sales—Warranty—Presumption of Acceptance.—Where goods have been sold with a warranty of quality, upon an agreement that if they were not all right, or

were in any way defective, they were to be charged back to the company, the purchaser does not, by failure to notify the seller of the non-acceptance of the goods, thereby ratify the purchase, and will not be presumed to have accepted the goods in the condition in which they were received. (*Peterson v. Door, Sash, etc. Co.*, 51 Mich., 86, and *Gutta Percha, etc. Co. v. Wood*, 84 Mich., 452, followed.)

GREECE, Administrator, v. HELM.—Decided May 6.—(Morse, C. J.)

Compromise of Actions by Administrator.—Where a special administrator is appointed to collect the property of an estate, which consists only of a right to action estimated at \$1,000, there being nothing to pay the expenses of the suit, the administrator can compromise the suit and save the expenses of litigation. *Shelden v. Estate of Warner*, 59 Mich., 444, approved. *Barry v. Davis*, 33 Mich., 515; *Probate Judge v. Abbott*, 50 Mich., 283; *White v. Ledyard*, 48 Mich., 264, distinguished.

PRATT v. CASTLE.—Decided May 6.—(Grant, J.)

Parole Evidence—Admissibility to Vary Terms of Written Agreement.—Parole evidence is inadmissible to change or vary the terms of a settlement in writing between parties which is intended to be a conclusive settlement of all transactions between them and not merely as receipts for money. Such a settlement cannot be set aside by parole evidence of a contemporaneous agreement that it did not include certain dealings not excepted in the writing. (Distinguished: *Rowe v. Wright*, 12 Mich., 289; *M. C. R. R. Co. v. Dunham*, 30 Mich., 127; *Powell v. Powell*, 30 Mich., 432; *Hart v. Gould*, 62 Mich., 263; *Freeman v. Freeman*, 68 Mich., 28.)

THE PEOPLE Ex Rel McDONALD v. BOARD OF SUPERVISORS OF ALCONA Co.—Decided May 6.—(Long, J.)

Validity of Deeds upon Grounds of Public Policy—*Quo Warranto*—Special Orders Given in Chambers.—Deeds given for land belonging to a county, by a board of supervisors to one of the members of the board may be void upon the ground of public policy but *quo warranto* is not the proper remedy to right such action. An order of the court granting leave to file an information, under § 8662 Howell's Stat., must be made while the court is in regular or special session; it cannot be made while the judge is sitting in chambers. 27 Mich. 4 and 32 Mich. 193 followed.

PIERCE v. JOLDERSMA.—Decided May 6.—(Long, J.)

Landlord and Tenant—Covenant to Keep in Repair—Right of Tenant to Vacate before Expiration of Lease.—If a landlord by express covenant agreed that he would have his building in suitable condition for the tenant's business on the date the tenant was to take possession, and that he would keep the premises in good repair, a failure to comply with such agreement, after several notices to him by the lessee, will be sufficient grounds for the vacating of the premises by the tenant, and will exempt him from payment of further rent thereon, though the lease was for a longer specified time. (*Young v. Collett*, 63 Mich. 331; *Bostwick v. Lasey*, 67 Mich., 558; *Leonard v. Armstrong*, 73 Mich., 557.)

VOORHIES v. INSURANCE Co.—Decided May 6.—(Long, J.)

Locus Contractus—Stipulations as to Time of Bringing Action on Policy.—Where an insurance policy is issued by an insurance company organized under the laws of the State of Indiana, to a woman residing in Michigan and who is of such age as to be uninsurable by the statutes of Michigan, such contract if consummated in Indiana is valid and the company will be estopped from denying its validity in a suit to recover the insurance by one of the beneficiaries. Where the policy contains a stipulation that "no suit shall be brought on this policy unless begun within nine months from the date of the death of the insured," the time limited for the commencement of the action could not commence to run until after the cause of the action accrued, and the action did not accrue until after the furnishing of the proofs of the loss. But the company cannot delay the party entitled to bring the suit by promises of payment and overtures of settlement beyond the time fixed for bringing the suit, and then set up in its defense that the action was not brought within the limit of the time stated in the contract.

TOTTEN v. BURHANS.—Decided May 6.—(Morse, C. J.)

Sales—False Representations—Evidence.—In an action for fraud brought by one who has purchased the interest of a partner in a certain business upon a representation that the business was a profitable one, and has taken accounts represented to be worth one hundred cents on the dollar, unless the evidence shows that the busi-

ness was unprofitable before plaintiff purchased defendant's interest no recovery can be had for injury to business reputation. Damages in such case would be restricted to the difference between the accounts turned over to him as good, and what they were actually worth, with interest from date of commencement of suit. To this extent recovery may be had though the defendant actually supposed the accounts to be good. It is immaterial whether a false representation is made innocently or fraudlently if, by its means, the plaintiff is injured. (*Holcomb v. Noble*, 69 Mich., 396.)

STRAUSS v. PARSHALL.—*Decided May 6.*—(Grant, J.)

Conveyance Between Husband and Wife—When Valid—Records as Notice.—A conveyance between husband and wife will be held to be valid when there is nothing to indicate that the wife took the conveyance with intent to defraud, and when there was a *bona fide* consideration therefor. The deed and bill of sale being duly recorded and filed, their record is a notice to those who afterward trusted the husband, that the property conveyed did not constitute part of his estate. False representations of the husband will not affect the rights of the wife, who neither did nor said anything to mislead. (*Hedstrom v. Kingsbury* 40 Mich., 636; *Allen v. Antsdel*, 38 Mich., 229; *Buhl v. Peck*, 70 Mich., 44; *Hill v. Brown*, 55 Mich., 191; *Woodman v. Woodman*, 72 Mich., 347.)

JONES v. DEMING.—*Decided May 6.*—(Grant, J.)

Wills—Construction—When Life Estate Conveyed.—A clause in a will which states: "Second, I give, devise and bequeath to my beloved wife, Mary Quinn, all the following real estate, * * * subject to the conditions that she is to receive the rents and profits and benefits during her natural lifetime, and in case necessary to sell and dispose of the same according to law," must be construed as conveying a life-estate only in the property. Each case must be decided upon the language used by the testator, and upon his intention to be gathered from the whole instrument. (*Eyer v. Peck*, 70 Mich., 180; *Glover v. Reid*, 80 Mich., 230; *Schehr v. Look*, 84 Mich., 263; *Cousino v. Cousino*, 86 Mich., 323; *Bailey v. Bailey*, 25 Mich., 188; *Smith v. Bell*, 6 Peters, 69; *Brant v. Virginia C. & I. Co.*, 93 U. S., 326; *Larson v. Johnson*, 47 N. W. R., 615.)

D. G. H. & M. R. R. Co. v. DETROIT.—*Decided May 6.*—(Grant, J.)

Bill in Equity—When Dismissed—Condemnation Proceedings—Granting of Injunction while Pending.—A bill in equity is properly dismissed when the questions involved are purely legal and can be disposed of upon the law side of the court. Where condemnation proceedings have been prosecuted to a determination which was adverse to the complainant, and an appeal therefrom is made and pending, the claim that irreparable injury will result from such determination will not be ground for the interference of a court of equity by injunction, and must be made a defense in the condemnation proceedings. (*Williams v. Elton Woolen Co.*, 33 Conn., 353; *L. S. & M. S. R'y Co. v. C. & W. I. R. R. Co.*, 96 Ill., 125; *Dickerson v. Commissioner of Highways*, 18 Ill. App., 88; *Rich v. Gow*, 19 Ill. App., 81; *Winkler v. Winkler*, 40 Ill., 179; *W. R. R. v. Patterson*, 37 Md., 126; *St. P. & M. R'y Co. v. Minneapolis*, 35 Minn., 141.)

ROBINSON v. BOARD OF ASSESSORS OF DETROIT.—*Decided May 11.*—(Per Curiam.)

Mortgage Taxes—Mandamus to Compel Assessment.—Mandamus will issue on the relation of the owner of certain shares of the capital stock of a bank, to compel the board of assessors to assess to the bank the value of real estate mortgages owned by it, and to deduct the value of such mortgages from the assessed value of its capital stock.

VAN HUSAN v. HEAMES.—*Decided May 11.*—(Per Curiam.)

City Plats—Mandamus to Compel Filing and Approval.—A land-owner cannot be prevented from platting his land, fixing the size of streets and locating alleys, so long as the proposed plat does not interfere with the general plan for streets; and mandamus will issue directing the approval and record of the plat. (*Campau v. Board of Public Works*, 86 Mich., 372.)

DETROIT RIVER SAVINGS BANK v. BOARD OF ASSESSORS OF DETROIT.—*Decided May 11.*—(Per Curiam.)

Mortgages—Taxation—Duties of Assessors.—Mandamus will issue at the relation of a bank to compel a board of assessors to assess the value of the mortgages against the relator, so far as the property covered by said mortgages is subject to taxation by said board, and to deduct the full value of the mortgage held by said bank from the assessed valuation of the capital stock.

STANDARD LIFE AND ACCIDENT INS. CO. v. BOARD OF ASSESSORS OF DETROIT.—*Decided May 11.*—(Per Curiam.)

Mortgages—Taxation of Mortgages—Assignment of Insurance Companies.—Under § 4 of Act No. 200 Public acts of 1891, it is the duty of the boards of assessors to assess all mortgages held by insurance companies as real estate, to deduct the same from the assets of the company, and to assess the company the remainder only after such deduction is made. (*Common Council v. Board of Assessors*, 51 N. W. Rep., 787.)

LATHAM v. THE BOARD OF ASSESSORS OF CITY OF DETROIT.—*Decided May 11.*—(Per Curiam.)

Mortgage Tax Law—Validity—Mandamus.—A writ of mandamus will issue to compel a board of assessors to assess to a bank as real estate the value of real estate mortgages owned by it, as well as the real estate owned by the bank, and to deduct the value of such real estate and real estate mortgages from the value of the capital stock as determined by the board of assessors. The construction of Sec. 2 of Act No. 200, given in *Common Council v. Board of Assessors*, 51 N. W. Rep., 787, followed.

LETTS v. LETTS.—*Decided May 13.*—(Montgomery J.)

Instructions—When Prejudicial.—Where a Court instructs the jury in such a manner as to disclose his view of the facts in the case, thereby making room for prejudice in the mind of the jury, the instruction thus given is assignable for error. (Same case in 73 Mich., 138.)

BLODGETT v. HOVEY.—*Decided May 13.*—(McGrath, J.)

Sale—Intent to Pass Title—Subsequent Appropriation.—Under an agreement that plaintiff should furnish logs to be sawed into lumber, by the defendant, the latter having the privilege of buying the lumber at a fixed price, it is a question for the jury to determine when the title to the lumber passes. The intention of the parties is to be gathered from the entire circumstances of the case.

PEOPLE v. MARTIN.—*Decided May 13.*—(Long, J.)

Larceny—When Value a Necessary Allegation.—Where an information charges the stealing of a horse and is framed under the general statute of larceny, it is necessary to allege and prove the value of the thing stolen. Conviction for horse-stealing will not warrant the special statutory penalty, provided in §9180 of How. Stat., if the information does not refer to the statute imposing it. (*People v. Town*, 53 Mich., 488; *People v. Jones*, 49 Mich., 591.)

IN RE ESTATE OF POWER.—*Decided May 13.*—(Grant, J.)

Advancements—Evidence.—Under How. Stat., §5781, a deed for property worth \$1,600 made to a son by a father in consideration of one dollar, and which is acknowledged by the father, on a separate piece of paper, to be a part of his son's patrimony, is an advancement. The certificate of acknowledgement of the father is admissible to show his purpose to treat it as an advancement, and does not vary the terms of the deed. *McClintock's Appeal*, 58 Mich., 152, distinguished.

SCHUYLER v. ANDERSON.—*Decided May 13.*—(Morse, C. J.)

Slander—Liability of One Person for Words Uttered by Another.—In an action for slander proof that a third party spoke slanderous words of plaintiff, in the presence and hearing of defendant, will not justify a jury in finding that defendant was the author or instigator of the slanderous words so spoken, when she said nothing and did nothing militating against the plaintiff, and there is no evidence that she heard what was said except from the inference of her presence within hearing distance.

PEOPLE v. GRANNEY.—*Decided May 13.*—(Morse, C. J.)

Criminal Law—Practice in Recorder's Court—Failure to Instruct—Variance when Question not Raised in Lower Court.—Under the law governing the recorder's court, an information, signed and filed by the prosecuting attorney is sufficient without verification. It is not error in the court to fail to instruct the jury that the defendant was presumed to be innocent until he was proved guilty, when it does not appear that respondent's counsel requested any such instructions, or called the court's attention in any way to its omission to so charge the jury. (Distinguished: *People v. Murray*, 72 Mich., 10; *People v. Macard*, 73 Mich., 25; *People v. Potter*, 50 N. W. Rep., 994.) A variance between the name of the person against whom the crime

was claimed to have been committed in the information and endorsement of witnesses, and the one whom the proof showed the crime to have been committed upon, will not be considered when that question was not raised in the court below.

PEOPLE V. MILLER.—*Decided May 13.*—(Morse, C. J.)

Assault with Intent to do Great Bodily Harm.—Evidence of Intent.—Upon a charge of assault with intent to do great bodily harm, it is proper for the jury to infer the intent to do serious bodily harm from a threat and a kick together, the result of which is serious injury. The defendant need not have contemplated with mathematical precision, or only intended to do the precise thing which followed his assault, but he must have had in contemplation an injury of general character. (People v. Ross, 66 Mich., 93.)

PIETTO V. BAVARIAN BREWING CO.—*Decided May 13.*—(McGrath, J.)

Damages for Injuries Caused by Defective Apparatus.—Instructions to Jury.—Liability of Successor.—Where plaintiff was injured by the breaking of rusty wire, and while cleaning a well, it is error for the court to instruct the jury that "the law presumes that every person who accepts employment does so with the risks incident thereto." A corporation who is the legal successor of a firm of individuals, carrying out their contracts, is liable for personal injuries sustained by a workman hired by the old firm and retained by the corporation.

KEAGLE V. PESSELL.—*Decided May 13.*—(Morse, C. J.)

Revocation of a Will Explaining Terms of a Mortgage.—Evidence of Will.—A testator who provides by will for the payment of a certain mortgage at a certain time can revoke the will as far as the disposition of the property to others was concerned, but cannot by such revocation alter or annul the contract with the mortgagor as to the time of payment when the mortgagor has performed his part of the contract. Where the original will has been destroyed by the testator its contents may be proved by a copy of the will or by parol testimony to explain the meaning of the contract in question.

SCOTT V. BEECHER.—*Decided May 13.*—(McGrath, J.)

Tenancy by Holding Over.—Where a tenant enters under a parol lease for a year or for years, and holds over, the law implies a contract on his part to renew the tenancy for another year, or as a tenant holding upon the terms of the original lease. The law presumes an intention by the tenant to continue the yearly tenancy from the holding over, and will hold the tenant liable for the yearly rental, even though the tenant, before the year's end, quit the premises. (Benfey v. Congdon, 40 Mich., 233; Tefft v. Hindman, 76 Mich., 672.)

KINNEY et al. v. MILLARD.—*Decided May 13.*—(Montgomery, J.)

Trespass Quare Clausum.—Proof of Possession.—In an action for trespass *quare clausum* by two plaintiffs, possession by both plaintiffs need not be shown; if one was in possession under a claim of right in both the action was properly brought. (Gilmour v. Wilbur, 12 Pick., 120; Austin v. Hill, 13 Johns, 236; 1 Wash. Real Prop., 422.) This possession by the plaintiffs may be either actual or constructive. (Ruggles v. Sands, 40 Mich., 560; Aiken v. Buck, 1 Wend., 466; Eel v. Quackenboss, 6 Hill, 537; 1 Chitty's Plead., 330; 2 Greenleaf on Evidence, § 614.)

BARON V. DETROIT AND CLEVELAND STEAM NAVIGATION CO.—*Decided May 13.*—(Montgomery, J.)

Negligence of Fellow Servants.—Liability of Master.—Where a hatchway is left open by men employed on board a ship, and one of the workmen falls through and sustains injuries, the owner of the vessel cannot be held in damages for negligence in not providing a secure working place. (Cantiff v. Blanchard Navigation Co., 66 Mich., 633; "Victoria," 13 Fed. Rep. 43; Armour v. Hahn, 111 N. S., 313; Hoar v. Merritt, 62 Mich., 386.)

BURNHAM V. THE WABASH WESTERN R. R.—*Decided May 13.*—(McGrath, J.)

Proximate Cause of Personal Injury.—Plaintiff purchased a ticket to Milan, which was accepted by the conductor, who gave a Milan check in return. The plaintiff was put off at a coal chute some distance from the railroad station, and in groping in the dark he stumbled and fell, breaking his leg. *Held*, that the duty of the defendant did not cease the moment plaintiff alighted from the train, nor until plaintiff had a reasonable opportunity to get away from the company's premises. Until that point was reached and passed, any dangerous obstruction causing the injury was proximate under the declaration.

CREGG v. C. & W. M. RY. CO.—*Decided May 13.*—(McGrath, J.)

Negligence—Presumption of Negligence—Contributory Negligence.—In an action for damages against a railroad company for injuries to an employee, the company cannot claim that a risk made hazardous by their own act is one which, by the exercise of reasonable care and diligence, they could not reasonably have become aware of and provided against. Neither is such a risk one which the employee assumed when he embarked in the service as incident thereto, nor one equally apparent to the observation of both employer and employee, nor is it one the mere failure to observe which is contributory negligence.

BADDER v. KIEFER.—*Decided May 13.*—(Morse, C. J. Grant and Montgomery, J. J. dissenting.)

Seduction—Evidence—Prejudicial Testimony.—In an action on the case for seduction, when the defendant upon examination admits the illicit intercourse with the plaintiff, it is improper and prejudicial for the prosecutor to ask if the defendant did not inquire of a doctor to find some way to get rid of the child, to kill it. The inquiry thus pressed could have but one effect upon the jury, and that to prejudice them against the defendant, by leading them to believe that he was contemplating another and more serious crime than seduction.

SHATTUCK v. COLE, et al.—*Decided May 13.*—(Montgomery J.)

Chattel Mortgage—Seizure under Insecurity Clause—Amount Payable to Redeem—Tender.—Where the mortgagees of a chattel mortgage have taken possession of the property under a clause giving them the right to take possession when they deemed themselves insecure, the mortgagor may redeem upon paying what the mortgagees would be entitled to realize and retain on a sale, and is not obliged to pay interest to the date of maturity. A tender by a third person, in behalf of mortgagor, of the amount due at time of tender, including interest and costs up to that time, is sufficient to discharge the lien which the mortgagees held upon the property, and further detention of it by them would be unlawful.

ZIMERISKI v. INSURANCE CO.—*Decided May 13.*—(Montgomery, J.)

Fire Insurance—Conditions in Policy.—Under a policy of fire insurance containing a provision that within sixty days after the burning of property the insured should furnish the company with a statement of the actual cash value of the building, and in case of disagreement appraisers to be appointed, and the insurance company, fifty-seven days after the receipt of the insured's statement having given notice that they wished appraisers appointed, the insured's right of action is not suspended because of his failure to appoint his appraiser within the sixty days when the delay has been caused by his inability to read the English language. (*Chippewa Lumber Co. v. Insurance Co.*, 80 Mich., 116; *Merley v. Insurance Co.*, 85 Mich., 210, distinguished.)

M McNALLY v. COLWELL.—*Decided May 13.*—(Morse, C. J.)

Negligence Resulting in Fire—Opinion Evidence.—In saw mills, where fires are liable to originate in the engine and boiler rooms, and where the construction of the mill is such that the surroundings are inflammable, so that the fire is liable to spread rapidly when once ignited, it is incumbent upon the person operating the mill to take care that fire should not consume the mill and spread to other property, by keeping on hand not only persons to watch the fire and keep it within the furnace, but some appliances for extinguishing fire in case it should accidentally escape and ignite some of the building. (*Hatch v. Hernandez*, 41 La., Ann. 992.) It is error to introduce witnesses as experts to prove what would be safe or ordinarily prudent to be used to put out fires in this case.

SANBORN v. DETROIT, BAY CITY & ALPENA R. R. CO.—*Decided May 13.*—(Opinion by Montgomery, J.; Morse, C. J. and McGrath, J. concurring; Long, J. and Grant, J. dissent.)

Railway Statutory Signals at Public Highways—Private Crossings.—Where a private crossing in erected by a railway company over its track for the purpose of skidding logs, etc., one mile from a highway crossing the same track, at which by § 8375, How. Stat., Vol. 3, the engineer and fireman are obliged to give a signal or alarm of the approaching train, a teamster at the private crossing is entitled to rely upon the signal at the highway the same as persons on the highway itself; and if the teamster at the private crossing is injured because of the negligence of the company in not giving the statutory alarm or signal, the railway company is liable for the

injuries received, the same as if received at the public highway. (*Ransom v. Railroad Co.*, 62 Wis., 178.) Persons lawfully using a private crossing are entitled to have the benefit of signals which they know is the duty or custom of a railroad to give at a public crossing. *Cahill v. Cincinnati, etc. R. R. Co.* (Ky.) 18 S. W. Rep., 2.

GREEN V. KNOCH.—*Decided May 20.*—(Montgomery, J.)

Agency—Non-disclosure of Principal.—When an agent obtained an option on a piece of land, taking an agreement to his principal for transfer, in the sale of which the agent was interested and secretly a party, the contract is invalid as against public policy, although no actual fraud may have been intended. (*Scribner v. Callar*, 40 Mich., 376.)

KELLY V. DULUTH, S. S. & A. R. R.—*Decided May 20.*—(McGrath, J.)

Contributory Negligence—Collisions.—Where an engineer of one railroad is injured in a collision between his engine and that of another railroad at a crossing, and the engineers of the colliding trains are both negligent in not observing the statutory provisions regarding crossings, the engineer suffering injury cannot recover damages from the other railroad.

NOBLE V. MURPHY.—*Decided May 20.*—(Montgomery, J.)

Suretyship—Subrogation.—Where the creditor applies the proceeds of a mortgage received by him to the extinguishment of the debts represented by notes other than those endorsed by the surety, amounting to many times the value of the security, the surety could not have been damnified by the creditor's appropriation, as his right did not depend upon the special contract of sale, but upon the doctrine of subrogation, and therefore the surety is not released.

GRENIER V. CATE.—*Decided May 20.*—(McGrath, J.)

Landlord and Tenant—Option of Longer Term—Waiver.—Where property has been leased for a certain time, with privilege to the tenant to elect a longer time at his option, if the tenant has notified the owner of the premises that he would not want it after the expiration of his lease, and the landlord, acting upon this notice, has incurred expense in making other arrangements, the tenant can not afterwards change his mind and elect to keep the property a longer term.

PLUMMER V. GOULD.—*Decided May 20.*—(Long J.)

Deed—Construction of.—In disputes concerning the meaning expressed in a deed, the intention of the parties as gathered from the whole instrument will control; and in case of a general description followed by a clause summing up the intention of the parties as to the premises conveyed, it has a controlling effect upon all prior phrases used in the description. (*Chapman v. Crooks*, 41 Mich., 88; *Jones v. Pashley*, 62 Mich., 621.)

SAGINAW UNION STREET RAILWAY V. M. C. R. R. CO.—*Decided May 20.*—(Morse, C. J.)

Trespass—Electric Street Railways.—Where the wires of an electric street railway were placed nineteen feet above the track of the M. C. R. R., when the order of the State Railroad Commissioner was that it should not be less than twenty-four feet above the track, the railway authorities commit trespass in cutting the wires, and are liable for all damages to the street railway company, occasioned by the severing of the wires. Cutting the wires is not the proper means of abating the nuisance.

PEOPLE V. O'BRIEN.—*Decided May 20.*—(Grant, J.)

Evidence—Res Gestæ.—Assignment of Error when no Exception Taken on Trial.—In a prosecution for murder, testimony of the doctor who dressed deceased's wounds shortly after they were inflicted when they were not considered dangerous, as to statements then made by the deceased is incompetent. Such statements are not considered as part of the *res gestæ*. Assignments of error relating to the omission or exclusion of testimony, to which no objection was made or exception taken, cannot be considered.

THE WARDER, BUSHNELL & GLESSNER CO. V. GIBBS.—*Decided May 20.*—(Montgomery, J.)

Evidence—Variance.—Where there is a variance between the promissory note set out in the declaration and the note introduced in evidence, and such variance is not discerned until after the note is received in evidence, it is within the power of

the court to permit an amendment, and as the defendant could not have been surprised by the course which the testimony took, the amendment on writ of error will be treated as having been made whether so made or not. (*Enright v. Insurance Co.*, 51 N. W. Rep., 928; *Smith v. Pinney*, 86 Mich., 484.)

FEARY V. TOWNSHIP OF ALLEN.—*Decided May 20.*—(Long, J.)

Sidewalk—Liability of Townships.—Crosswalks in incorporated villages, by Act No. 176 of Laws of 1881, are under the control of the township, and it is liable for injuries received by reason of any defect therein. Where a sluice way is made across the road bed under the sidewalk, causing the walk to serve a double purpose, as culvert and crosswalk, it does not lose its character as a crosswalk so as to exonerate the township from supervision of it as a crosswalk. The Act of 1887, imposing a liability upon townships, etc., is constitutional. *Tice v. Bay City*, 78 Mich., 209. and *Campbell v. Kalamazoo*, 80 Mich., 655, followed.

PORTSMOUTH SAVINGS BANK V. ASHLEY.—*Decided May 20.*—(Long, J.)

Municipal Bonds—Validity—Distinction Between Authority to Sign and Authority to Deliver.—An authority to sign negotiable bonds of a village does not confer authority to deliver, and an innocent purchaser for value of such bonds, although regularly informed, obtains no rights thereunder, the bonds having no legal inception or valid existence as such until delivered. *Burson v. Huntington*, 31 Mich., 415, *Chipman v. Tucker*, 38 Mich., 43, and *Walker v. Eberts*, 29 Wis., 197, followed. [N. B.—The decision in this case will be printed in full in our next number, with copious notes and annotations thereto by a well-known lawyer.—ED.]

PEOPLE V. HAMAKER.—*Decided May 20.*—(Long, J.)

Information—Charge of Crime Not Known to the Law.—One Donovan, on 17th Feb., 1887, was convicted of the "crime of entering a saloon in the night time with intent to commit the crime of robbery," and sentenced. On the 23rd Oct., 1891, the defendant assisted Donovan in making his escape. *Held*, that defendant could not be held to answer to the crime charged against him, since Donovan was not shown, either by the information or by the evidence, to have been convicted of a crime then known to the law. Where the statute enumerates several elements as combining to create a crime, the crime cannot properly be described without including all these elements. (*Kasler v. People*, 8 Mich., 431; *Byrnes v. People*, 37 Mich., 515; *Hall v. People*, 43 Mich., 417; *Harris v. People*, 44 Mich., 305.)

THESES—CLASS OF '92, LAW.

-
- ADAMS, J. H.—Equities and the Assignment of Mortgages.
 ARMSTRONG, Louis—Of the Revocation of Wills.
 AUSTIN, E. W.—Progress of the Jury System.
 AYRES, G. E.—Partnership.
 ATWOOD, J. T.—Law of Mining Gold and Silver.
 ANDERSON, R.—Declarations Relating to a Part of the Res Gestæ.
 ATWELL, W. A.—Conditional Sale.
 BROTHERS, E. D.—Fellow Servants.
 BABCOCK, E. G.—Estoppel.
 BARNES, O. T.—Damages.
 BERRY, P. A.—Notice of Acceptance of the Guarantee, Necessary to Bind the Guarantor.
 BASKERVILLE, H. E.—Sale and Purchase of Lands.
 BURNS, D. E.—Stoppage in Transitu.
 BURNETT, J. L.—Constitutional Law.
 BURCHARD, G. H.—Some Leading Principles in Law of Infancy.
 BENNETT, J. J.—Malicious Prosecution.
 BROWN, L. N.—An Inn-keeper's Responsibility.
 BUDGE, A.—Revocation of the Will.
 BUTZEL, H. M.—The Doctrine of Ultra Vires in the Law of Private Corporations.
 BRONSON, J. D. R.—Rights of Creditors Against Private Corporations.
 BURKE, J. F.—Our Diplomatic System.
 BITHER, W. A.—Trusts.
 BURST, E. A.—Spendthrift Trusts.
 BROWNING, J. W.—Private Corporation's Liability for Accidents.
 BENSON, C. V.—Priority of Appropriation as Regards Rights in Water in the States and Territories of the Arid Regions.
 BOOTH, F. W.—Contracts to Make a Will.
 BRUERE, T. C.—Revocation of Wills.
 BURWASH, F. M.—Bills as Payment.
 BUTLER, T. W.—Synopsis of Michigan Law of Husband and Wife.
 BOLARD, J. A.—Public Nuisance.
 BORLAND, W. P.—Law of Schoolmaster and Pupil.
 BERRY, G. V.—Ejectment.
 BRETZ, C.—Liabilities of Inn-keepers.
 CARBAUGH, W. J.—Private Corporations.
 CLOUGH, B. F.—Origin of Equity Jurisprudence.
 CRANE, G. O.—Selection of a Homestead.
 CROTHER, W. P.—Malicious Prosecution.
 CHATTEETON, F.—Declarations Relating to the Res Gestæ.
 CHILDS, H. W.—The Law of Negligence as Applied to Municipal Corporations.
 CALLAM, F. W.—Relative to Principal and Agent.
 CHURCH, E. A.—Stoppage in Transitu.
 COPLEY, A. W.—Testamentary Capacity.
 CROSS, G. H.—Self Defence.
 COULSON, W. J.—The Estate in Entirety.
 CAMPBELL, A. L.—Declarations as Exceptions to Hearsay Evidence.
 CRALL, D. A.—Patents.
 CARD, W. S.—Chattel Mortgages in New York.
 COMBES, Frank—Ultra Vires.
 COLE, A.—Life Insurance.
 CROSBY, J. Q. A.—The Law of Principal and Surety in Its Application to Bills and Notes.
 CLEMENT, E. H.—Contracts in Restraint of Trade.
 CLARK, B. R.—Res Gestæ.
 CHAMBERLIN, M.—Proceedings in Equity.
 DUNBAUGH, C. P.—The Right to Follow the Dip of a Vein.

DAWSON, J. W.—Complaints in Civil Action Under the Code.
 DEMPSEY, F. T.—Custody of Children.
 DAVIS, W.—Revocation of Wills.
 DURALL, B. C.—Mill Dams and Liabilities.
 DWYER, J. W.—Proximate Cause.
 DEMPSEY, M. A.—Negligence.
 EWING, A. E.—The Statutory Will in Michigan.
 EVANS, W. B.—Caveat Emptor.
 EBERLY, G. A.—Elevators and Warehouses.
 ERDLITZ, J. G.—Slander and Libel.
 ELLINGSON O.—Domicil.
 ESTEY, C. W.—Foreclosure of Mortgage Under "Power."
 FOWLER, F. L.—Spiritualism and Testamentary Capacity.
 FITCH, D. H.—Res Gestæ Evidence.
 FOX, T. F.—Origin and History of the Law of Wills.
 FOLLMER, E. S.—Custody of Minor Children.
 FREER, N. E.—Law of Copyright.
 FRIEDMEYER, J. G.—Stock and Shares.
 FARR, E.—Injunction Against Municipal Corporations.
 FABER, A. T.—Stoppage in Transitu.
 GOTTMAN, W. C.—Trover.
 GARD, H. V.—Doctrine of Cy Pres.
 GILTNER, W. H.—Vendor's Lien.
 GORDON, J. T.—Consideration.
 GAFFEY, T. J.—Facts.
 GREENWOOD, L. H.—Burden of Proof.
 GRANT, F. L.—Franchises.
 GALE F. H.—Liquidated Damages.
 GRAVELLE, A. W.—Copyright of Books.
 HOLLOWAY, W. L.—Equitable Estoppel.
 HEARD, E. R.—Discussion of the Five Most Common Easements.
 HARRIOT, E. E.—Express Warranty in Sales.
 HORD, F. T.—Revocation of Agency.
 HOLLENBECK, W. T.—Trustees.
 HARVEY, W. M.—Personal Liability of the Stockholders of a Private Corporation.
 HURSPPOOL, J. C.—Citizenship.
 HAWES, G. E.—Rights and Liabilities of the Mortgagees.
 HAMMOND, F. D.—Modern Uses of Streets.
 HALLETT, THOS.—Doctrine of Caveat Emptor.
 HARRINGTON, JAS.—Right of the Writ of Habeas Corpus.
 HOEBEL, F. W.—Liability of Surety with Reference to Promissory Notes.
 HARLEY, H. L.—Penalty on Liquidated Damages.
 HERLEY, J. H.—Chattel Mortgages.
 HART, C. K.—Liability of Master for Negligence of his Servant.
 HALL, J. E.—Mandamus.
 HOLE, F. J.—Equity of Redemption.
 HARPER, R.—Pleadings.
 HAAS, S. A.—Executory Considerations.
 HAWK, F. B.—Law of Attachment in Missouri.
 HORDEN, W. T.—Eminent Domain by Private Corporations.
 HOLLOWAY, J. S. W.—Stoppage in Transitu.
 HOTCHKISS, E. P.—Sleeping Car Companies' Liability.
 JAMISON, R. R.—Garnishment.
 JESS, R. E.—Malicious Prosecution.
 JOHNSON, J. C.—Privilege.
 JONES, I. L.—Power of a Partner to Bind the Firm by Simple Contract.
 JEFFERS, G. A.—History and Development of Trusts.
 JENNY, Miss J. R.—Marital Authority in New York.
 KERWIN, J.—Real Estate Mortgage.
 KILLEN, G. B.—Res Gestæ.
 KOON, W. A.—Is Marriage a Contract, Sacrament or Status?
 KNAUF, J.—Garnishment and Its Procedure.
 KENNEDY, J. F.—Damages.
 KOTEGAWA, T.—History of the Imperial Parliament of Japan.
 KELLEY, G. L.—Rights, Duties and Liabilities of a Tenant.
 KINDERBERGH, F. A.—Law of Dower.
 LETT, W. D.—Constructive Fraud.

- LOEB, A. I.—Mining Law.
 LUKEHART, W. D.—Law of Private Ways.
 LAW, E. F.—Contributory Negligence in Torts Suffered by Infants.
 LEMMON, C. M.—Equitable Rights of Married Women.
 LUTHER, W. P.—Consideration in Contracts.
 LAWSON, C. A.—The Legal Tests of Criminal Responsibility of So-called Insane Persons.
 LYONS, T. R.—Liabilities of Partners by Holding Out.
 LAWRY, T.—Carriage of Goods for Hire.
 LEWIS, M. E.—Jurisdiction and Grounds of Divorce.
 MEYER, L. T.—Breach of Promise to Marry.
 MCQUIRE, N. J.—Surviving Partners.
 MANLEY, J. M.—Profit Sharer's Liability as Partners.
 MURPHY, C. L.—Repudiation of a State Debt.
 MALEY, J. E.—Contracts as Effected by the Fourth and Seventeenth Sections of the Statute of Frauds.
 MORRIS, C. B.—Mechanic's Liens.
 MARSHALL, R. P.—Probable Cause in Malicious Prosecution.
 MACFALL, R. T.—Origin and Growth of Trial by Jury.
 MARTIN, A.—Vendor's Implied Lien.
 MCCALMONT, S. M.—Res Gestae.
 MOORE, C. R.—Revocation of Wills.
 MYERS, H. A.—Riparian Rights.
 MAY, W. J.—The Action of Ejectment. When it Will Lie.
 MERRITT, W. W.—Alienation of Real Property by Deed.
 MCCORKLE, J. H.—Origin of Power to Make a Will.
 MENOHER, W. E.—Relation of Teacher to Pupil.
 MCNEIL, H. L.—Caveat Emptor.
 MORRIN, T. A.—Psychological Presumptions of Law.
 MEARS, S. T.—Do Equities Attach to a Mortgage, Securing a Negotiable Promissory Note when the Note is Transferred to Innocent Third Parties for Value?
 MOORE, F. C.—Homicide in Self-defence.
 MEAKER, J. F.—The Best Evidence.
 MCGILL, J. M.—The Plea of Insanity.
 MCCARTY, A. D.—Police Power of a State.
 McLAUGHLIN, A. A.—Legislative Control of Private Corporations.
 MANNY, W. J.—The Power of a Corporation to Act.
 MORGAN, G. E.—Implied Warranty of Title in Sales of Personality.
 NOLAN, T.—Origin and Development of the High Court of Chancery in England.
 NICHOLS, M.—Estoppel.
 NIEBUHR, S. A.—Res Gestae.
 NORRIS, A. W.—Attachment of Property.
 O'CONNOR, G. M.—Insanity in Criminal Prosecutions.
 OLYER, C. E.—Acceptance of Receipts Under the Statute of Frauds.
 OVERHOLT, L. S.—The Law of Libel.
 PATTERSON, G. R.—Divorce in New York.
 PADGETT, J. A.—Extrinsic Evidence to Explain Wills.
 PURCELL, M. J.—Parent and Child.
 PULOIPHER, M. B.—Real Estate Mortgages.
 PARMELY, M. B.—Assault and Battery.
 PHILLIPS, H. W.—Ultra Vires of Private Corporations.
 PARDEE, G.—Right of Trial by Jury.
 PHELAN, P. J.—Absolute Divorce.
 POWELL, L. S.—A Complaint Under the Missouri Code.
 POLKINGHORN, W. T.—Dying Declarations as Evidence.
 PENNINGTON, J. W.—Ratification.
 PIERCE, F. M.—Conveyance of Real Estate by Deed.
 PRESCOTT, W. H.—Property of Married Women; Its Disposition.
 REINER, G. J.—Burden of Proof.
 RANDALL, A. J.—Actions.
 REYNOLDS, J. W.—Law of Trial by Jury.
 REYNOLDS, W. H.—The Seventeenth Section of the Statute of Frauds.
 BORICK, H. C.—Extrinsic Evidence in Aid of the Interpretation of a Will.
 SHAW, R. M.—The Doctrine of Virtual Monopoly.
 SEARS JOSEPH.—Malicious Prosecution.
 SULLIVAN, R. W.—Dissolution of Private Corporations.
 SMITH, H. A.—Fraud and Undue Influence in the Making of Wills.

- STREET, J. J.—Contributory Negligence.
 STORY, W. P.—Stoppage in Transitu.
 SMITH, W. A.—Writ of Mandamus.
 STRICKER, E. A.—Property Subject to a Chattel Mortgage.
 SANDERSON, A. E.—The Declaration and Its Incidents.
 SUTHERLAND, G. A.—Revocation of Agency.
 SEYMOUR, A. H.—Divorce Jurisdiction.
 STANNARD, H. D.—The Law of Gratuitous Bailments as Applied in Banking.
 SIMPSON, A. P.—The Law of Usury.
 SHOEMAKER, H. B.—Who is a Fugitive from Justice?
 SHANK, W. L.—Ratification of Contracts.
 SMITH, L. A.—The Right of Personal Liberty.
 SMITH, PERRY—Action of Assumpsit.
 SHIELDS, E. E.—Alimony.
 STEELE, G.—The Word "Price."
 SPRAGUE, V. D.—Set-off.
 STORMS, D.—Garnishment in Justice's Courts in Michigan.
 STEELE, W. S.—Railway Passenger Carrier's Liability.
 SHARP, P.—Chattel Mortgages.
 STONE, R.—Electric Railway Litigation.
 SPIES, F. A.—Trustees.
 STURTZ, C. E.—Nuncupative Wills.
 STORMS, D. E.—Telegraph Company's Negligence.
 SULLIVAN, D. P.—Admissibility of Evidence within the Knowledge of the Deceased Person.
 SMITH, H. B.—Exception to the Inadmissibility of Hearsay Evidence.
 SHELDON, F. A.—Commencement of a Suit by Attachment in Michigan.
 THOMPSON, W. D.—Wills, with Reference to Their Validity and Sacredness.
 TROOK, V. A.—Party Walls.
 TSCHARNER, F. P.—The Law of Executors and Administrators.
 THOMPSON, R. F.—American and English Doctrines of the Distinction between Contracts of Sale, and for Work and Labor Coming under the Seventeenth Section of the Statute of Frauds.
 THOMAS, C. H.—Marriage.
 TREBY, SAM'L.—Attachment of Property under Michigan Statutes.
 TICKNOR, H. M.—Ultra Vires.
 VAN ARSDALE, J. A.—The Difference in the Application of the Law by the United States and State Courts.
 YANCEY, D. W.—Letting Land on Shares.
 YOUNG, W. E.—Res Gestæ.
 WILBER, E. J.—Contributory Negligence.
 WICKS, K. E.—Replevin. Who may Maintain the Action?
 WOODWORTH, H. L.—Trespass Quare Clausam Fregit.
 WOOD, B. B.—Garnishment.
 WHITSETT, GEO. P.—Liability of Promoters of Corporations for Secret Profits.
 WAITE, E. H.—History and Use of Seals.
 WATERS, J. C.—Mandamus.
 WALSH, N. R.—Sales Under the Seventeenth Section of the Statute of Frauds.
 WEBSTER, ARTHUR.—Opinions of Title.
 WILSON, M. R.—Married Women and Modern Legislation.
 WELSHEIMER, F. L.—Implicit Warranty of Quality.
 WELSH, F. J.—Admission of Confessions in Evidence in Criminal Cases.
 WALKER, J. H.—Negligence.
 WILSON, G. B.—Partition Fences.
 WERTZ, R. C.—Action of Replevin.
 WINN, W. H.—Contractual Obligation.
 WASHBURN, C. G.—Infants' Contracts.
 WHITELY, J. H.—The Modern Trust.
 WEBER, DAN'L.—Chattel Mortgages.
 WOOD, H. L.—Stoppage in Transitu.
 WENTWORTH, A. F.—Rights and Liabilities of Attorneys at Law.

BOOK REVIEWS.

THE SECRETARY'S MANUAL.—By W. A. Carney, Santa Paula, Cal. \$1.00.

This little hand book of 113 pages is claimed to be, "A compilation of forms, instruction and information, designed more particularly for the use and guidance of secretaries of corporations, in expressing and recording in a systematic manner the proceedings of stockholders or members, and of boards of directors or trustees; adapted also to associations, societies, etc." All of this claim is fully substantiated in this praiseworthy little work. All the minute questions which arise in the formation of corporations of all kinds in their organization, conduct of meetings, etc.; and the little knotty points as to the mode of procedure, are here answered in a most concise manner. An examination of the book must convince one of its merits and practical value.

JURISDICTION; ITS EXERCISE IN COMMENCING AN ACTION AT LAW.—By Joseph H. Vance, Law Librarian of the University of Michigan. \$1.00

This little work appeared a little over a year ago and has met with a hearty reception at the hands of the bar, and has received many cordial recommendations from those who are using it in their every day practice. The purpose of the book is not only to assist in determining what court has jurisdiction, but also how the jurisdiction of the court is brought into action, and by what principle the action is governed. Only the necessary fundamental principles of the law of the subject are given, in a clear and concise manner, without lengthy and wearisome discussion and argument. The value of the work is also enhanced by the citation of numerous cases bearing on every important point. To the young lawyer just starting in the actual practice of his profession it is quite obvious that few books, if any, are of more practical value.

THE ROMAN LAW OF TESTAMENTS, CODICILS AND GIFTS IN THE EVENT OF DEATH (Mortis Causa Donationes).—By Moses A. Dropsie, Translator and Editor of Maceldey's Hand book of the Roman Law. Philadelphia: T. & J. W. Johnson & Co., 1892. Pp. xi. and 197.

In the preface to this book the author says he "is not aware that there is any work in the English language occupying the same field as this book. The growing importance of the Roman law and the increased attention that it is receiving from jurists, has caused the profession to extract out of its vast treasury of learning new precedents and new illustrations of legal principles adapted to the growing wants of higher civilization, and thus further enrich the common law, especially on the subject matter of testamentary dispositions, the law of which depends in a great measure on judicial decisions and but little on statutes." A first reading of this book leaves a feeling of uncertainty as to what period of Roman law is being discussed. Probably a second reading will remove this uncertainty. It will afford a useful index to a large amount of literature on the subject.

A DISSERTATION ON MARITAL AUTHORITY IN NEW YORK.—By Julia Regula Jenny.

In this treatise, a new view of an old subject has been admirably presented from an historical standpoint. That there is such a thing as progress in law; that the laws change to meet the changed demands of a higher civilization, particularly as they bear upon the marital relations, is the burden of this thesis. After an introduction, in which are discussed the different relations the *feme* has borne the baron from the earliest times, Miss Jenny considers more at length the relations subsisting at the present time, in her own State of New York, where the inequality before the law has been theoretically discarded, and that things have gone so far that on criminal charges the woman's chances of acquittal are greater than her male associate. The common law fiction that marriage merges the two high contracting parties into one, and that one the man, may, if things continue, merge the two in one, but that one the woman. Technically and accurately, Miss Jenny has elaborated the following phases of the subject:

1. The effect of marriage on the acts and engagements of the wife.
 2. General privileges of the wife.
 3. General privileges of the husband.
 4. Conclusion.
-

THE DOCTRINE OF "ULTRA VIRES," IN THE LAW OF PRIVATE CORPORATIONS.—By Henry M. Butzel.

This technical and generally little understood subject, is handled by the writer in a masterly manner. In the first part of the thesis, after emphasizing the importance of the subject, he proceeds to show the gradual development of the doctrine. Having given a cursory view of the Roman *collegium*, which often transcended its delegated powers, and the early English corporation, with its almost unlimited powers, as seen in Sutton's Hospital case (10 Coke R., 30 b.), he takes up the modern corporation, where the doctrine of *Ultra Vires* becomes important. He considers two periods: First, strict construction of the corporate charter, when the corporation was considered a legal entity with limited capacities; second, liberal construction, when equitable, instead of technical, rules govern *Ultra Vires* contracts.

In describing the evolution of corporations the writer sums up the arguments for and against the validity of *Ultra Vires* contracts, and hence shows a reason for so many conflicting decisions. By considering the cases up to date—one case cited being from the April number of the MICHIGAN LAW JOURNAL—it is demonstrated, in Part II of the thesis, that definite and positive rules are being developed from what formerly seemed but a confusion of cases, without any harmonizing principle pervading them.

THE RIGHT OF PERSONAL LIBERTY.—By L. A. Smith.

Mr. Smith has developed this intricate and historically important subject with great skill. After giving a clean-cut definition he proceeds to show how vastly different are the conditions under which the people of our own and of earlier times have attempted the exercise of this right. Instead of the ancient theory that the individual existed for the benefit and by the grace of the government, which was personified in the king, we have established the theory that government exists for the good of its citizens. It was under the old theory, when the Sovereign, supported by precedent and

the powerful fiction of Divine Rights, ruthlessly disregarded the most sacred guarantees of his subjects whenever it suited his whim, that the germ of popular government took root, and which has developed into a "government of the people, by the people, and for the people." The author discusses four great steps in the growth of these political ideas: (1) The events which led up to Magna Charta. (2) Petition of Rights. (3) Bill of Rights, which was the historical precedent of our own Constitutional Bill of Rights. (4) Habeas Corpus Act, during the reign of Chas. II., which secured to every person a sure and speedy remedy against long imprisonment on a criminal charge. The benefits of this act we have inherited from our English forefathers, and it can only be suspended in cases of national emergency. The limitations on the right of Personal Liberty are imposed for the general welfare of society, and may be either of a public or private nature, all of which are elaborately discussed in this admirable thesis.

THE STUDENT'S QUIZ BOOK, ON SUBJECTS TAUGHT BY THE PROFESSORS IN THE LAW DEPARTMENT OF THE UNIVERSITY OF MICHIGAN.—By C. C. Walsh. Chicago. Callaghan & Co.

What seems most surprising is that this scheme, aiming as it does to put into the hands of the law students an epitome of all the subjects announced in the curriculum of the great law schools of our country, has not been proposed before. That there is a pressing need for what this work promises to be has been demonstrated at the University of Michigan, where the printed lecture system, grossly evil in its effects and discountenanced by the faculty, has been in vogue. While following the general plan pursued by the lecturers on the different topics taught, Mr. Walsh, who has had practical experience as a quiz-master, and thus knows what a student most needs, has systematized and subordinated the various subjects until the entire work stands out in logical simplicity, so that the student, without waste of time, can comprehend the whole. This does not purport to be a royal road to legal learning, but by a careful exercise of the principle of selection all the essential portions of the various branches of the law are drawn out and annotated, or illustrated by a citation of the material facts of all the leading cases from which the principles were elicited, and these cases are set forth shorn of all obsolete or immaterial matter. By making text books of acknowledged excellence the basis of these outlines, a permanence will be given to them which will be unaffected by any change in the manner of presentation of the lectures. The work as yet is in manuscript, but when completed will be bound in four volumes and sold to students at a very reasonable rate. That the work has been done entirely by Mr. Walsh, that it is published by Callaghan & Co., that it is recommended by the faculty of the University of Michigan, are all points in favor of the work.

E. R. S.

MICHIGAN LAW JOURNAL.

VOL. I.

JULY, 1892

No. 6.

ADDRESS TO THE ALUMNI OF THE LAW DEPARTMENT.

HON. BENJAMIN BUTTERWORTH.

Mr. President and Gentlemen of the Law Alumni:

It is my purpose to talk to you in a friendly and fatherly way, rather than to deliver a formal address. You have chosen the profession of law for your vocation in life. If you are fairly equipped with native ability and adequate mental furnishings and enter the field of your labor with a just appreciation of the duties and obligations you assume, and a high resolve to perform them, there opens wide before you the gates of usefulness and honor. I put usefulness before honor because there is no true honor that is not preceded by useful endeavor. Let no one here hope to catch a nearer way or find a less rugged path to rank and station. We know that men not unfrequently attain to official position by intrigue with the vicious, supplemented by corrupt political action. But, make no mistake; the rank and station thus won confer no honor, and the success which crowns such efforts is but seeming. In the audit of life's great account it will find no place upon the credit side. Believe me, young gentlemen, no worthy success comes except as the result of adherence to duty. Therefore, let *duty* be to you a word of imperial command, bearing constantly in mind that duty is ours, results are God's. We can safely "trust Him to make amends for duty's loss"—if such loss there can be. But in the grand summing up of a worthy life it will not be found that strict adherence to duty ever entailed a loss. He is suffering from moral decay who deems an addition to his wealth acquired by fraud and dishonesty a substantial good, or the failure to so acquire it on presented opportunity a loss. My observation and experience in life alike teach me that if actuated by no higher or nobler motive, yet under the laws of the Eternal, even as a matter of selfish interest "honesty is the best policy." It has been so ordered, and the law is immutable. It has not escaped our observation that the belief is common that the lawyer is necessarily in the practice of his profession, an adept in low cunning, an expert in finesse, an economist of truth, not to say a wilful prevaricator. I remember that a year or two after I was admitted to the bar I visited a dear old Quaker

uncle. He was one of the best men in the world; charitable and full of good works. After we had been chatting awhile, he asked me how I was getting on in the law, adding with solemn seriousness, "I suppose in the practice thee has to lie right smartly." It required a protracted argument to convince him that lawyers were not of necessity suffering from moral obliquity in the behalf mentioned as a necessary incident of their calling. This absurd belief is the result of a course of reasoning which starts from a false premise, and hence while it leads to a logical conclusion, is none the less fallacious and unjust to the legal profession.

Our critics start out with the correct assumption that as a general proposition, both sides of a controversy cannot be right; that, therefore, one lawyer or the other must be combatting for the wrong, and in his endeavors to maintain the wrong, he must be dishonest and untruthful. But in all this, those who put us under condemnation, beg the question. They assume that lawyers know beforehand what is in fact to be ascertained as the result of a trial. If the right and the wrong—if the justice and the injustice of a cause were or could be known beforehand, preparation for the labor of trial would be obviated and the lawyer's occupation gone.

It is easy to be wise after the fact, but often difficult before the truth is known. The experience of the ages is, that in the complex-affairs of life differences will rise among men and between men too, who are honest. These differences must be adjusted and in some manner consistent with right and the preservation of social order in the community. To this end courts were established to hear and determine controversies between citizens. Experience also abundantly demonstrates that in order to reach right conclusions in the administration of public justice, certain rules must be observed. These rules are numerous; they relate to and govern every step of progress along the line of legal procedure from the inception of the cause to the final judgment or decree. The proper conduct of a cause before a court of justice demands that one who is learned in the law prepare the case for hearing, and aid by his counsel both the client and the court. It must be obvious to every intelligent mind that only persons suitably trained for the discharge of the duties can properly perform them. This is not less true of the vocation of the lawyer than of the practice of the physician and surgeon, and is equally important. We need and employ a physician when we are ill. And in civilized society it is of the highest consequence that justice prevail, since without it there can be no real liberty, no social order without it, and to maintain justice and enforce its decrees, there must be established tribunals for its administration. So I submit that careful and intelligent reflection will leave no doubt, not only that lawyers are indispensable to the well being of the community, and the state, but they, least and last of all can afford to indulge in the practices so frequently laid to their charge. They could not pursue a course better calculated to undermine the foun-

dation upon which the usefulness, dignity and honor of their profession rest.

The young man who takes his place in the ranks of the legal profession with the idea that the fixed canons of his calling authorize, permit or tolerate conduct which does not square itself to the cleanest honor, that young man will be a disgrace to the bar and become an ulcer on the community where he resides. No man who has such blunted moral perceptions and low estimate of his profession should have anything to do with the administration of public justice, except perhaps to sit in the prisoner's box. Let it be remembered that an incorruptible judiciary is the surest guardian of public liberty and private right under our written Constitution and form of government. It is the rock upon which the waves of factional strife, of civil discord and legislative and executive oppression must break or our free institutions perish from the earth. Legislators may, in a measure shirk their duty and become corrupt. Executive officers may grow careless and negligent in the discharge of their trusts, and yet our free institutions endure. But if the judiciary shall become faithless and corrupt in the administration of its functions, there will remain to us no anchor of safety to keep us from drifting upon the rocks and going to pieces. It would seem to follow that those who are officers of the courts and thus identified with the important and honorable function of administering public justice, should be men of undoubted integrity; of well approved probity. Beyond this, it is well known to the profession that no lawyer is held in such utter contempt by his fellows, as the one who has the reputation of indulging in what is termed sharp practice, while the corrupt attorney is despised and condemned alike by the court and the bar. One more remark in this behalf: It is not the mere fact of being a member of the profession that brings honor, but the noble use of the opportunity it presents. I do not want you to infer from what I have said that you should be so solicitous lest injustice be done, that you must look at both sides of the case on which you are retained. Oh no; we must be good in this life, but practical in our goodness. Take care of your own side of the case. You can safely trust your adversary to take care of the other. The court and jury will do the rest.

In fact, you will in all probability become so absorbed in your client's cause that you will conclude that there is really but one side to the case, and *that* your own; and you will not unfrequently be surprised to find the judge not in accord with your views, and in fact wholly dissenting. But you will be comforted with the reflection that he views both sides and weighs every fact and argument with impartiality, and that whatever the result, you have had a fair hearing and an honest determination of your cause. Again, keep studying, keep reading; don't lay aside your books as soon as you go away from these halls armed with a diploma. Your duties will exact constant, unremitting study. Remember the law is a growth. You will observe that the facts and conditions to which the law must be

applied cannot change, and each day brings new and ever varying conditions. New facts are presented. The law *must* adapt itself to these new conditions and facts since *they* cannot be changed to suit the law. Hence the law grows and develops under the operating influences of each day's necessities. Again, first know the facts in your case and then determine what justice demands. When you have ascertained what is just in the premises, you may safely rely upon finding that the law sustains you. This involves trying the cause fairly before the tribunal of your own conscience, and be sure before that tribunal you are true to your own intellect. If you are not just before the court of your own conscience, you will bear watching before all other tribunals. To thine own self be true. If thou art, it follows as the night the day that thou canst not be false to any man. It will often occur in the course of your practice that you will be applied to to sustain that which on the showing is dishonest and fraudulent. The client being willing to pay you liberally for helping him play the scoundrel. If you consent, you become an accessory before the fact. Some one may say, "What's that to me? I am a lawyer, it is my business to aid my client in freeing himself from the entanglement of the law." Certainly, but there is a broad distinction between assisting a client to play the scoundrel and defending one who is a scoundrel, against unjust and illegal assaults upon his person and property of a scoundrel. You may defend a man charged with burglary or arson, but you are not for that reason authorized to assist in the commission of the burglary or in burning the building. The function of a lawyer is to promote justice. In your bearing at the bar be a gentleman under all circumstances. Never lose your temper, in the trial of a cause; the moment you do your adversary has you at a disadvantage if he is capable and governs himself. Treat your adversary with dignified courtesy and the court with the utmost deference. No judge who is fit to preside in a court of justice will, for a moment, permit quarrelling or bandying epithets in his presence. If you should, under great provocation, forget yourself, and use offensive language to either court or counsel, improve the first moment when you can command yourself, to apologise to the court and opposing counsel. This is due to yourself not less than to them. Do not forget that you are required by the obligations of your oath to uphold the dignity and majesty of the law which the court represents. Never put a witness on the stand until you ascertain what he knows about the case. You can't conduct an examination properly without you do. Occasionally you will find a conceited, self-righteous individual who will decline to tell you anything, and will inform you that he will tell what he knows when he is called to the witness stand. Such a witness usually has a small head and large conceit. Never call a chump like that to testify if you can avoid it.

Again it will frequently occur that after you have talked with a witness to get at the facts of your case, he will, when cross-examined deny that he has ever said a word to you about the case. Such persons are hon-

est and mean to be truthful, but seem to have an idea that if they admit having talked with the attorney about the case, both court and jury will think they have been coached if not suborned, and will deliberately deny the truth rather than fall under suspicion. Never fail to tell the witness, if he shall be asked if he has talked with the plaintiff or defendant, as the case may be, or his attorney, to say frankly, yes; I told him all I knew about the case. Do not yield to any temptation to play the pettifogger. The name is thoroughly descriptive of the creature to which it is applied. A pettifogger is a wart on the nose, a bunion on the foot of the profession. Let candor and courage based on honest conviction mark your professional career. I am frequently asked by young men just entering the profession "shall I take part in politics?" I answer unhesitatingly yes. It is not only your privilege but it is your duty as patriotic citizens. Politics relates to the science of government. This is a government of the people, by the people. They are the source of all power. The theory of our government is that each citizen will take part in politics, that he will not merely go to the polls and vote occasionally, but that he will keep himself informed concerning the public needs; unless he does he is merely a voting animal. The security of our free institutions rest upon the prompt and intelligent discharge of political duty by our citizens. Their indifference and neglect are the most fruitful source of danger to the republic, the man who fails to discharge his political duties should be disfranchised. Do not be restrained by the assertion we constantly hear that politics is a filthy pool into which a reputable citizen may not step without danger of contamination or humiliation. The statement is a slander on our system of government and an insult to the wisdom and patriotism of the fathers who founded it.

If at any time or in any place—municipal, county or state affairs are found under the control and management of bad men; if corrupt demagogues bear sway; if political bummers are supreme at the primaries, it is because the great majority of good citizens are grossly neglectful of their duties. You all know that the idle and vicious, the thoughtless and corrupt, constitute a very small per cent. of the population. But they are effective and powerful because *they* are active, while the worthy are inert, and in the main wholly indifferent about political affairs. To say that you should not take part in politics, is to say that you shall not be good citizens, since no man can be a good citizen, and yet neglect the most important duties appertaining to good citizenship. The preparation for and practice of your profession renders you peculiarly fit to take part in politics and in such participation become most useful to the state.

First, You are familiar with the Constitution and the law. This knowledge is essential in legislation.

Second, In the practice you become what in common parlance we call "an all round man." Your calling requires that you should have a general knowledge of almost every branch of business. Since you may deal with

each and all of them in the administration of the law; the law of carriers, the law of contracts, commercial law, domestic relations; all treat of matters concerning which there is much legislation and in this we find an answer to the question which is often propounded, How is it so many lawyers are elected to the legislature and to Congress. Obviously because their course of study, their daily vocation supplies the training necessary to fit them for the duty of legislators. Can it be truly said that you may properly abstain from this field of labor and yet discharge your duty to the state? Far from it. But in entering the arena of politics, do not fail young gentlemen, to rightly appreciate the just obligation you take upon yourselves.

It is a matter of regret that so many regard politics as a mere game to be played with all the tricks and cunning which the unscrupulous can devise.

Niccolo Machivalli, the Florentine statesman thought so, and his career abundantly attests that he was a master in political intrigue. He reduced lying and hypocrisy to a fine art. He oscillated between the dungeon and the Court of Kings. He was alike able and corrupt. But it may be said in extenuation or palliation of his course and of his philosophy, that he lived in times and near courts essentially venal and corrupt. He was but a part of and reflected the conditions with which he was environed. But that age has passed away. No such conditions hedge about the politician of to-day, and fraud and deceit avail only because our people neglect to fittingly rebuke those who employ such agencies. A moment's reflection concerning the relation of each citizen to the government makes it obvious that the strength and excellence of our governmental fabric depends and must depend upon the moral and mental quality of our people, since the republic is so organized and constituted that each citizen whether good or bad becomes a part and parcel of it. It would seem logically to follow that a pure government of corrupt citizens is not possible, nor can we reasonably hope for strength where the material is weak. In this age of enlightenment, the form of government is of less consequence than the manner of administration. The poet truly said:

"About forms of government let fools contest;
That best administered is best."

Every possibility of good, every suggestion of danger to the public appeals to you to become politicians, politicians in the higher and better sense. Every interest that can be imperiled by bad government invites you to its defense, and the line of defense is in the political arena. The careful student will discover that the new economic conditions that are present with us, have presented important social, commercial and political problems for solution. The spirit of unrest which abounds in the world is due to a cause, which we must seek out and understand. That cause suggests the necessity for wisdom and prudence in council and justice and equality in legislation and administration.

The relation of capital and labor, the influence of aggregated capital in multiplying and perpetuating itself in the hands of a few, present a vexatious problem. Its control of elections, its power in shaping legislation, these each and all will demand intelligent investigation and timely and considerate action. The tendency to-day in this country is toward a plutocracy protected by an army. But no such thing is possible in the United States, or if possible could not long endure. But the point is to reach better and happier conditions without civil conflict, to rise to a higher plane without passing through the ordeal of revolution. That the world's experience protests that this is impossible, I know; but is it still impossible? Must the seed of better conditions still be sown in peace and harvested in revolution? Much depends upon such as you. You see where your political labor can be well bestowed. I am not taking a pessimistic view of the situation. It is unnecessary. It is quite enough to survey existing conditions and consider the influences that are operating to shape our destiny. We cannot turn from such contemplation without realizing that there is important work for each citizen to do in order to continue to enjoy liberty *with* law.

Many who think they are pessimists are merely dyspeptics, and a very large per cent. of those who imagine they are optimists are only simpletons, to put it no stronger. Unfortunately the American character has been diluted by having poured into it an inky stream gathered from the social cesspools of the old world, while at the same time there has come to us a class of most excellent citizens. But there has been no discrimination. The philosopher came, but the foolish came also. The industrious and frugal came, but the idle and vicious did not remain behind. And unfortunately the bad element at once enters into the current of our political life and corrupts it. The corrupt demagogue finds these creatures serviceable in carrying out his schemes. So many good and worthy citizens refuse to take part in politics that demagogues become our masters. It is needless to say this condition cannot continue without undermining the foundations of our government. Viewing the situation as it is, do you feel, young gentlemen, that you can get your own consent to refrain from active participation in politics. The hope of the nation is in our capable, honest young men. If such as you remain out of the field of politics, there is no salvation in us. I do not mean that you must necessarily be a candidate for office. I cannot detain you to discuss the manner of discharging political duties. You will find, as in the law, that intelligence supplemented by candor and courage, based on honest conviction of duty, to be the law and the prophets. I leave the theme of politics to offer a few words of counsel with reference to each of you personally. In your dealings with men you will find much sage philosophy in the advice of Polonius to Laertes. Touching his personal appearance he said:

"Rich thy apparel as thy purse can buy,
Though not expressed in fancy."

That might be paraphrased thus:

Dress handsomely, but don't be a dude.

Personal appearance has much to do with success in life. First impressions are lasting and a slouch never produces a good impression. Of course we hear and read of virtue in rags, but the rags add nothing to the attractiveness of virtue. In the same line, keep your office neat and clean.

Again, Polonius says:

"Give all thine ear, but few thy voice."

In other words, be a good listener, but ever cautious with your tongue. This sage advice is applicable to all the relations of life. No man ever injured his prospects by being a prudent listener. Many have wrecked their hopes by imprudent conversation. Burns puts the same idea in different language.

"Conceal yourself as weel's ye can
Fra critical dissection,
But keek through every ither man
With sharpened, sly inspection."

Don't mistake knowledge for wisdom. The possession of the one, does not even imply the possession of the other. "Knowledge dwells in hearts replete with thoughts of other men."

Wisdom is rather the result of the proper assimilation of knowledge. An adaptation of knowledge to wise use, of means to an end.

I have been asked frequently what books to read in order to acquire readiness of expression, apt illustration and impressive earnestness. The Bible and Shakespeare; nowhere else will you find such sententiousness of expression. Quote the Bible reverently, not flippantly. There is no passion, prejudice, hope, ambition, feeling or motive known to the human heart to which Shakespeare has not given expression, in language of unsurpassed excellence.

Another word of friendly counsel: Persevere, persevere; don't become discouraged because clients do not come flocking to your office. You will find that all things come to him who worthily waits. Try a cause involving a few dollars with the care and caution that you would bestow upon matters of greater pecuniary importance. The small case may be the vestibule to litigation of greater consequence.

Let me impress upon you the great value of a good name. In other words, the value of character. It is a capital all may acquire. No capital is more readily lost. Never do or consent to that which tends nearly or remotely to compromise your own self-respect. Remember there is no margin between right and wrong, no margin between truth and falsehood. What truth and honor demands, that do and do promptly.

I do not intend to imply that we can attain to perfection, but our witness and example can be always in that direction. We often hear it said, it is difficult to know just what is right. That is not true. In the daily walk of life the man who is constantly finding trouble in ascertaining what

common honesty requires, will on self examination learn that he has in fact been endeavoring to reconcile treacherous inclinations with the plain rule of right; his trouble results from his inability to reconcile two things which are in their very nature irreconcilable.

Remember life is serious. So treat it. I do not mean that we shall be solemn as owls, though by so doing many fools have passed current as philosophers. But in the affairs of life be serious and candid in your intercourse with your fellows. Be industrious; be temperate and frugal, and worldly prosperity will come to you.

Do not hope to have your labor done until age and tottering footsteps call a halt and command repose.

In the battle of life, young gentlemen, each setting sun must see some point of vantage, lost or won. You are part of a great, moving procession and sustain a certain relation to the countless multitude. Their eyes are on you. If worn in the conflict you drop out of the ranks or turn aside, but for a moment, your place is taken and the rank closed up, and the service you have rendered may be forgotten, being obscured by the present effort of him who has succeeded to your place. How graphically this is set forth in the words Shakespeare puts into the mouth of Ulysses in his interview with Achilles, who was ailing in his tent while the Greeks were waging a doubtful combat with the Trojans. Achilles says, "what, are my deeds forgot?" Ulysses answers:

"Time hath, my lord, a wallet at his back,
A great sized monster of ingratitude,
Those scraps are good deeds past what are devoured,
As fast as they are made, forgot as soon
As done; perseverance, dear my lord,
Keeps honor bright. To have done is to hang
Quite out of fashion, like a rusty nail
In monumental mockery. Take the instant way,
For honor travels in a strait so narrow
Where one but goes abreast; keep then the path,
For emulation hath a thousand sons,
That one by one pursue: If you give way
Or hedge aside from the direct forthright
Like to an entered tide, they all rush by
And leave you hindermost:
Or, like gallant horse in first rank fallen
Lie there for pavement to the abject rear
Overrun and trampled on;
Then what they do in present,
Though less than yours in past, must overtop yours,
For time is like a fashionable host.
That lightly shakes his parting guest by the hand,
And with his arms outstretched as he would fly
Grasps in the comer: "Welcome ever smiles,
And farewell goes out sighing."

In quoting this I am only impressing upon you the importance of unceasing endeavor. If you would be remembered as able in council, as

valiant in battle, you must remain in the former to the end, and in the conflict as long as you can bear your armor.

You have a thousand advantages of which we knew nothing, and true it is that your competitors have like opportunity with you. So in the end it will be found that he who has wrought best has won most in honor.

Young gentlemen, I rejoice to greet you on your entrance to the ranks of your profession. I know what a healthful influence you can exert in directing the current of thought to mould the public judgment. Your honored professors will watch your career with anxious interest. They feel that they in large degree have helped to prepare you for life's duties. They will hereafter, as heretofore prove constant friends, ready to respond with counsel and advice.

Again let me assure you I have sincere happiness in saying to each one of you "Welcome to the ranks of the profession" and may you prosper according to your merit.

THE CONSCIENTIOUS LAWYER.*

 PROFESSOR JEROME C. KNOWLTON.

Students of the Law Department of the University of Michigan:

The labors of the college year of '91-'92 are closed. About three hundred graduates are to return to their respective homes, situated in some thirty-six states and territories of this Union, and there to exert a potent influence in business, professional and public life. To this large body of young men about to take up the burdens of true citizenship, we will make a few suggestions outside of technical law. You are ambitious to succeed in your chosen profession and inquire, what are the qualifications for success? We answer, something more than a knowledge of the elementary principles of the law; one may be learned in the law and yet disgracefully fail. Your profession demands something more, something higher than a mere storage battery of legal principles. The truly successful lawyer must be a conscientious man, possessed of a keen conscience of the most sensitive type. The profession is based on a cultivated sense of right.

Again, an average mental force, natural or acquired, is essential. Intellectual activity, governed by sterling common sense has been the leading characteristic of the most eminent men at the bar. It is the symmetrically developed average man that stands permanently in the front rank. Eccentricities within the bar may bring temporary notoriety but are seldom an element of strength. One of the highest compliments that can be paid a lawyer is to say of him that he is a man of average ability and good common sense. Those of you who may be timid at this time and in doubt as to your natural qualifications should take courage. Genius is not necessary to success in the law. The young man who relies upon it is sure to fail. The bar is noted for the lives that have been wrecked through dependence upon natural gifts. Too often a young man, intoxicated by the early victories which genius brings, is lulled to stupor while some less favored one in the race passes him by. Take no courage from the possession of natural gifts. Do not be discouraged by your physical infirmities. What the world demands of the lawyer of to-day is, not a display of genius, but the development of ideas. Ideas are not the gift of God; they are the result of patient, prolonged and honest study.

This thought suggests the last qualification; industry stimulated by an ambition that exacts a close distinction between recreation and idleness. The one is a necessity, the other brings failure. There are secular employ-

*Closing lecture to the students of the Law Department of the University of Michigan, delivered June 23, 1892.

ments in which one may approximate perfection, but in the law the older you grow the greater the task before you. There is no end to your labor. The lawyer who has completed his education is unknown to this world. We may by incessant labor rise above our contemporaries, but we will never master the science of law, which is divine in its origin, until our eyes are closed to this world and another give us new light.

So I say to you, young men, who are ambitious to reach the goal, there are three conditions: An average ability, an untiring industry, and above all a keen conscience which shall sit like a pilot over your eventful career, watching every ripple, every gust of wind, every cloud upon the horizon, and at times steering you through a stormy controversy safely between conflicting doubts, off the shoals and away from the rocks, over a course of rectitude to the end of life.

A few days since most of you stood before a court of record and took the solemn oath, "I solemnly swear that I will support the Constitution of the United States, and Constitution of this State, and that I will faithfully discharge the duties of an attorney at law and solicitor in chancery according to the best of my ability." This was no idle ceremony, not a matter of form but of substance. You have pledged your conscience to your client, to the court, to the state and nation. A man may preach religion, or practice medicine, or pursue the ordinary avocations of life, without taking an express oath of allegiance, but no man can practice law until he solemnly affirms allegiance to the state and fidelity to his client. We may well inquire, at the moment this oath is taken, what are the obligations that it imposes upon a conscientious affiant? What new responsibilities have been assumed? If as private citizens we have become officers of a court of justice burdened with a public trust, what is this trust and confidence? So great that the state insists upon a sworn promise of allegiance and faithfulness!

A lawyer is a public man. In a certain sense he holds a public office. He is something more than a private citizen; his oath of office has burdened him with certain public duties which he cannot renounce, and chief among these is active loyalty to the state. Said Justice Miller, in "The Test Oath Cases;" "That fidelity to the government under which he lives and true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo Saxon race shows that for ages past the members of the legal profession have been powerful for good or evil to the government; they are by the nature of their duties the moulders of public sentiment on questions of government and are every day engaged in aiding in the construction and enforcement of laws . . . to suffer treasonable sentiments to spread here unchecked is to permit the stream on which the life of a nation depends to be poison at its source."*

* *Ex Parte Garland*, 4 Wall.

This active loyalty to the state is something more than sentiment, it is the performance of duty. No lawyer has the right to say that he has no opinion upon a public question or that he has no interest in it. He ought to be interested; he ought to investigate and then form and express an opinion. He has an active duty before him in all controversies over social, economical and educational questions. He should be conservative against radical changes. The conservative force of the legal profession has been in England and this country a substantial guaranty to civil and political liberty. But his doubts and uncertainties should rise from patient and conscientious study, and not simply from ignorance or indifference.

You have sworn not simply that you will not violate, but that you will actively support the Constitution. The people expect you to keep your oath; they look to you for guidance. At all times of great political or social disturbances, lawyers have been leaders. It has been said, on high authority, that if the profession in the South had been loyal to the government in 1860, we would have been spared the horrors of the Rebellion. This may be a mistaken view. That the lawyers in the South at this critical period acted in good faith is unquestioned; but supposing that they had stood before the laymen of that section, saying: "We are right in doctrine, but wrong under the Constitution; secession is treason," what would have been the result? Do not forget, young men, the active loyalty involved in your express oath of allegiance and remember that when you enter upon the practice of the law, your first client is the state and nation.

Understand, however, that you are not urged to rush into politics. If you have chosen public life as a calling other considerations are involved; but if your ambition is to become a lawyer you should decline all political preferment during the first ten years of your professional life. Engage in active politics in the morning of your labors and you are certain of becoming a poor lawyer and not certain of becoming a statesman. One whose ambition is that he may be recognized as a lawyer and a statesman must be first a lawyer; he must win his spurs at the bar. He who attempts to be first a statesman and then a lawyer is in danger of failing in both avocations. The history of great lives advise us. Lord Erskine had studied law eight years before taking a seat in Parliament. Lord Eldon was ten years at the bar before politics attracted his attention.

A review of the lives of public men in this country would illustrate more forcibly the importance of giving close attention, during the first few years, to the practice of the law. One striking example is sufficient. Daniel Webster recognized to-day, forty years after his death, as the greatest American constitutional lawyer, was admitted to the bar in 1805, and was at once offered a clerkship in the court of common pleas, of which his father was one of the judges. The fees of the office were fifteen hundred dollars per annum, a small fortune in those days. The poverty of his father's family tempted him to accept it; clients were not rich, attorneys' fees were small. The emoluments of office would bring comforts into his

father's family, while to decline them was to condemn himself and them to an uncertain future. His father favored his accepting the office, but through the advice of a far-seeing friend Webster declined it, and thereafter gave his undivided attention to the practice of the law. For nine years contested causes in court, and not contested elections, educated him. In the end there was no public trust too good for him. He had by close attention to the duties of his profession, that jealous mistress, secured the confidence of the people, and laid that broad foundation upon which rests his name and fame to-day and for all time to come.

The lawyer has before him not only social and public duties, but also a moral duty to perform. Every state in the Union and every civilized government has laws by which the right to practice in its courts depends first of all upon good moral character. The keenest sense of morality is essential to success, but something more should be added. I believe it to be the duty of every lawyer to identify himself with some religious society. The practice of the law presents an army of temptations. Lawyers more than any other class of men need the strength that comes from an abiding faith in the Supreme Being.

Mr. Webster, in speaking of the devout life of Jeremiah Mason, at one time a leader of the New England bar, said: "Religion, therefore, is a necessary and indispensable element in any great human character. A man with no sense of religious duty is he whom the Scriptures describe in such terse and terrific language as 'living without God in the world.' Such a man is out of his proper being, out of the circle of his duty, out of all his happiness and away, far far away from the purpose of his creation." You may also remember the eloquent words of Erskine, spoken at the trial of Thomas Paine. He said: "For my own part, I have ever been deeply devoted to the truths of Christianity; and my firm belief in the Holy Gospels is by no means owing to the prejudices of education, though I was religiously educated by the best of parents, but has arisen from the fullest and most continued reflections of my riper years and understanding. It forms at this moment the great consolation of a life which, as a shadow, passes away; and without it I should consider my long career of health and prosperity, (too long, perhaps, and too uninterrupted to be good for any man), as the dust which the wind scatters, and rather as a snare than a blessing."

It is sometimes whispered around that a Christian faith is a sign of weakness in a lawyer; that an over sensitive conscience is always at war with a lawyer's duty to his client; that one cannot be a sharp, incisive, forcible and brilliant lawyer, and at the same time be a Christian gentleman. This is not true, and if true, it is a disgrace to our profession. In matters of religious belief each one of you must judge for yourself. You will support me, however, in this proposition; that among the strong men who have left to the profession a great name and reputation are found some of the most devout Christians. Within sight of this campus are living

two men, whose names we need not call. They have at times been in the service of this institution. They are soon to lay down their life work. There are no two men living within the state who have won as great a reputation in law. None are better known or more highly honored for great public service to the state, and yet these two men, so well known to us all, have found no conflict between Christian conduct and professional duty. Throughout their lives they have been within the church; firm and conscientious believers in a Christian God.

The conscientious discharge of a lawyer's full duty requires that he guard zealously the honor of the profession. You will be tempted often to do what is unprofessional, though not morally wrong. At times circumstances may incline you to solicit business or to ask for a retainer. Do this only in leap year. The lawyer should receive a retainer, as modestly as a young woman receives a proposal of marriage. Buy no man's confidence. Respectable lawyers do not solicit business.

Some clients may suggest the doing of a clearly immoral, if not a criminal, act. Resent the insult and close against such a client the outer doors of your office. But most clients, of even more than average respectability, will tacitly intimate milder indiscretions; such as hiding a witness, or treating a juror, or sounding a judge, or the playing of some trick on opposing counsel, such as taking a snap judgment or settling a cause without his knowledge. All these and others like them are decidedly wrong. Yet you will be harrassed by such suggestions from the beginning to the end of every cause, unless by your conduct you give your clients to understand that you possess a most sensitive conscience and are responsible to the profession for your conduct in court; that you are no man's hireling. Occasionally an attorney offers as an excuse for a questionable act, the demand of his client. This is a disgrace to the profession. You must not sell your professional discretion at any price. A client may buy your time, your service and knowledge, but not your right to determine questions of legal ethics or your authority over methods of litigation. Allow me to impress upon you this fundamental principle: When a client comes to you for advice you must insist upon your advice being followed or decline the retainer. To do otherwise is to sacrifice the honor of your profession.

It is not, however, enough to do right but you must appear to do right. As a rule the profession is not sufficiently mindful of appearances. This is the great mistake of the profession. Lawyers are not guilty of one per cent. of the charges made against them. Their acts are not understood. This fact renders it extremely important that you should avoid every ground of suspicion. For this reason never take a case against a personal friend or against any person with whom you sustain any relation whatever. You cannot afford it. If you should accept such a retainer and then fail in the litigation, even after the most conscientious effort, your client would be inclined to feel that your defeat was due to your bias toward his adver-

sary; that you had failed because you intended to fail. Decline to place yourself in any such position. You must always do more than satisfy your conscience.

Once within the bar and you sustain an impressive relation to the Court, to opposing counsel and to your client. To the Court you owe respect, deference, and at times obedience. You are officers of the Court. The proprieties of the bar are too numerous for present consideration. During the first few years of your practice you should make a study of the conduct and deportment of truly eminent lawyers. This much, however, may be given for your guidance: Before the Court, manly dignity and self-respect should be maintained. To respect a judge is not to fear him; to defer to him is not to sacrifice the right of private judgment, and to obey him is not to cringe or crawl. Due regard for authority does not involve a sacrifice of self-respect.

To opposing counsel you owe good faith and courtesy. These will render your life of battles endurable. If the emergency of a controversy require that every man shall look out for himself, say so frankly; but having once pledged your word to opposing counsel, keep it. It is more important that you should be an honest lawyer than that your client should win. As between lawyers there should be kindness and the extension of every indulgence. Each should seek to lighten the others' labors so far as is consistent with the protection of his client's rights. Give litigants to understand that the issue of a cause is not between the lawyers but between the parties; that a law-suit is not a cock-fight, but an effort to distribute justice. At the trial contend against your adversary frankly and with force, but not with bitterness. Above all things avoid personalities. The attorney who makes a personal attack on opposing counsel simply disgraces himself.

To your client, you are all we have said and much more. The relation of attorney and client is extremely confidential. The law has spread its mantle of privilege over your communications. Behind this veil of secrecy is the greatest opportunity for an educated conscience to do valuable service. Here meet your client with frankness and insist upon knowing the whole truth. This is not always possible, especially in criminal cases. Even in civil cases, the disposition of clients to deceive their attorneys is surprisingly strong. As a rule, they will come to you with a theory and tell you only so much as supports it. Abandon their theories, and search by diligent inquiry for the truth. Having possessed yourself of it, advise your client accordingly. If he has no cause of action, say so. If he has a cause of action say so, hesitatingly. Never assure your client of a verdict in advance of the trial. Courts and juries are too uncertain and your judgment may be faulty. Only the ignorant lawyer speaks positively to his client.

It is your duty to encourage a settlement of causes entrusted to you. Never undertake the trial of a case for the money there is to be made in

trying it, unless you look upon the law as a trade rather than a profession. A law-suit is a very unfortunate thing. Our ablest lawyers settle more causes than they try, and often charge more for settling them than they would for trying them. They look upon the trial of a case as a surgical operation to be avoided if possible, but when it becomes inevitable then they cut deep and with a keen blade.

Whenever you enter the court-room for the trial, enter with that comfort and strength that comes from having made a conscientious effort to avoid bringing the matter before the Court. But when the jury is sworn, then the hour for temporizing is closed. Then insist upon every substantial point in your client's favor. Give your client your whole power as a lawyer. Discharge your full duty and then you will never be afflicted with that remorse that comes from the feeling that if you had given more active attention to the case you might have won a verdict.

You have pursued under the Law Faculty of this department a course of legal study that you might equip yourself for the fulfillment of these obligations which your profession exacts of you. We have failed in our labors if your minds are not impressed with the importance of your duty to the state, to your profession, to the courts and to your client. We have failed if you are not impressed with the fact that you must enter the practice of the law governed by the most liberal spirit of tolerance toward all men and toward all institutions; toward all religious creeds and beliefs. A lawyer must be a broad-gauged and conservative man. He can not afford to be narrow and technical. He must not be a bigot; a bigot never won a sharply contested issue of fact before any court.

Your course at this institution has been not simply for the acquirement of knowledge but also for the development of character. We have failed if during your stay here those traits of character which count for genuine success have not been sharpened, or if you have not been impressed with the fact that the greatest element of strength in a lawyer is, not his learning nor his cunning, but his manhood. You go forth to a long and hard struggle. No one can sympathize with you more deeply than those from whom you received elementary instruction in law. You will be beset by temptation and at times almost overcome with despair. Poverty may stand between you and your ambition, while a sacrifice of honor lays before you and your children, bread, and meat. Turn aside from such temptations. Never compromise your professional honor. Make an honest fight in life, stand before the world, known to all men as a conscientious lawyer. Satisfy the ego, your innermost self, and God will be pleased and man ought not to complain. So shape your conduct from day to day that, when your head rests on its pillow at night, a clear conscience shall lull you to sleep.

APPOINTMENT OF PRESIDENTIAL ELECTORS.

McPHERSON *et al.* v. ROBERT R. BLACKER, Secretary of State.

Michigan Supreme Court, June 17, 1892.

The authority to name presidential electors may be delegated, by the state legislature, to portions of the state fixed as districts by the legislature, and this is not in conflict with Article II, Section 1, of the Federal Constitution, which provides that "Each state shall appoint in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress."

In the interpretation of the Federal Constitution resort must be had to contemporaneous construction. The contemporaneous construction which was placed upon Article II, Section 1, of the Constitution of the United States was that plenary power was reposed in the several legislatures of the states to prescribe methods for choosing presidential electors other than by a vote of electors of the entire state.

The object of the act, entitled, "An Act to provide for the election of electors of President and Vice-President of the United States, and to repeal all other Acts and parts of Acts in conflict therewith," is sufficiently expressed in its title, although it provides for an election of alternate electors, and the title relates only to choosing electors. It does not thereby violate Article IV, Section 20, of the Michigan state constitution, which provides that no law shall embrace more than one object, which shall be expressed in its title.

Nor is this act invalid because it fails to provide for filling vacancies in case of the death or disability of both electors and alternates.

The law is not necessarily inoperative *in toto* because, in some of its provisions, the legislature has exceeded its power, for the unconstitutionality of one part of the statute cannot defeat other portions unless the nature of the unconstitutional provision is such as to render it of vital importance to the law.

H. M. Duffield, B. M. Cutcheon, John Atkinson and H. A. Haigh, for relator.

F. A. Baker, J. W. Champlin, A. A. Ellis and T. E. Barkworth, for respondent.

Montgomery, J.—The relators, who are candidates for the office of electors of president and vice-president, placed in nomination by the Republican party, ask for a mandamus to compel the respondent to give notice of an election to be held on the first Tuesday in November to fill said offices under the statute in former years providing for an election of electors by the state at large.

The complainants allege that act No. 50 of the public acts of 1891, known as the Miner law, is unconstitutional and void. It is first averred that the law in question is in conflict with article II, section 1, of the Federal Constitution in this, that it attempts to delegate to portions of the state fixed as districts by the legislature the power to name electors, whereas the section referred to, it is contended, confers this authority and duty upon the state at large, acting as a corporate unit in its corporate

capacity. Secondly, it is contended that even though the Legislature may thus delegate this authority to districts, the law is fatally defective in the following respects: (a) That it violates article IV, section 20, of the Constitution of this state, which provides that no law shall embrace more than one object, which shall be expressed in its title, in that it provides for an election of alternate electors, whereas the title relates only to choosing electors. (b) That the act is inoperative, for the reason that it fails to provide means for canvassing the votes of electors in those portions of Wayne County which constitute the first and portions of the second, sixth and seventh electoral districts. (c) That even if the election of alternate electors is valid the act makes no provision for filling the office in case both the elector and alternate shall die or become disqualified before performing their duties.

Most evidently the question of greatest importance is that relating to the true interpretation of section 1, of article II, of the Federal Constitution. The provision of that section is that "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress." On both sides it appears to be conceded that the word "state" as here employed, means the body politic and corporate. On the part of the relator it is contended that the state must, in the election of electors, act as a unit, and cannot delegate the authority to name electors to any fractional part of the state, as a district fixed for that purpose alone or for that and other political action. On the part of the respondent it is contended that the section in question gives the legislature plenary power to prescribe how and in what manner the state may choose its electors, whether by the legislature itself or by all the electors voting for a general ticket or by electors voting in districts.

In Story on the Constitution, volume 2, page 304, fourth edition, it is said: "It is observable that the language of the Constitution is that 'each state shall appoint, in such manner as the Legislature thereof may direct,' the number of electors to which the state is entitled. Under this authority the appointment of electors has been variously provided for by the state legislatures. In some states the legislatures have directly chosen the electors themselves; in others they have been chosen by the people by a general ticket throughout the whole state; and in others in electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district. No question has ever arisen as to the constitutionality of either mode, except that of a direct choice by the legislature. But this, though often doubted by able and ingenious minds, has been firmly established in practice ever since the adoption of the Constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it.

If the question were to be determined solely by a reference to the language employed, it may be admitted that there would be much force in

the contention that the state must act as a unit and that no lesser body could be delegated to perform any portion of the duty vested in the state as a body corporate, and it might possibly be held that the words "in such manner as the legislature thereof may direct," conferred only the limited power of directing how the state, acting as an entirety, shall make the apportionment. But in my judgment these words are clearly *susceptible* of a construction which confers upon a legislature the power to say how the state action could be voiced.

In such a case resort is properly had to contemporaneous construction. Judge Cooley, in his work on the Constitution, says: "Contemporaneous construction must consist simply in the understanding with which the people received it at the time, or in the acts done in putting it in operation, and which necessarily assume that it is to be construed in a similar way. In the first case it can have very little force, because the evidence of the public understanding, when nothing has been done under the provision in question, must always necessarily be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention." Cooley's Const. Lim., p. 67.

This rule has been so frequently recognized both by this court and the Supreme Court of the United States as to require little more than reference to the authorities. *Martin v. Hunter's Lessee*, 1 Wheat., 351; *Bank v. Halstead*, 10 Wheat., 63; *Ogden v. Saunders*, 12 Wheat., 290; *People v. City Railway v. Mills*, 65 Mich., 646. Speaking of this rule in *Ogden v. Dean*, 14 Mich., 406; *Bay City v. State Treasurer*, 23 Mich., 499; *Detroit Saunders*, Mr. Justice Johnson says: "It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution, and of the sense put upon it by the people when it was adopted by them."

In *Bay City v. State Treasurer*, *supra*, it was held that constitutions are to be construed as the people construed them in their adoption if possible, and the public history of the times should be consulted, and should have weight in arriving at that construction. See also *People v. Harding*, 53 Mich., 481.

The practical construction which was placed upon the section under consideration, was certainly such as to sustain the contention of the respondent that the contemporaneous interpretation was, that by their

action plenary power was reposed in the several legislatures of the states to prescribe methods for choosing electors other than by a vote of electors of the entire state. In the first presidential election Maryland and Virginia each adopted the district plan. Maryland continued to so choose her electors down to and including the year 1832. Massachusetts in 1788 adopted a plan of nominating electors in districts by a vote of the people, to whom the Legislature was limited in making a choice. In 1796 they were chosen by districts. In New York the method of choosing electors first adopted was by vote of the legislature, but in 1825 the district system was adopted and was in use in the election of 1828. In North Carolina the district system was adopted in 1803, and in use in 1804 and 1808. In Kentucky the district system prevailed until 1828. In Tennessee the district system prevailed from 1796 to 1836. In Indiana the district system was used in 1824 and 1828. In Illinois the district system prevailed from its admission into the Union until 1827. In Maine also the district system prevailed from 1820 until and including the election of 1828. It will be seen therefore that the exercise of the right to choose the electors by districts began at the first election held under the Constitution, and continued to be exercised by some of the states for forty years. There was an abandonment of this method due, except possibly in a single instance, to growing doubts as to its constitutionality. The states in which it had been invoked adopted the general ticket method, it is believed, not because of any doubt of the authority to choose electors in districts, but in order that more power could be wielded by the state in political conventions. Madison, who acted as a member of the committee which reported to the Federal convention the method finally adopted for electing president, in a letter written in 1828, and in which a constitutional amendment which should make the choice of electors by districts imperative, was recommended by him, in referring to the action of the convention, said: "The district system was mostly, if not exclusively, in view when the constitution was framed and was adopted, and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular states which had set the example." *The James Madison Letters*, Vol. III, 333.

Another persuasive fact in determining whether the intention was to limit the exercise of the right of the state to choose electors to a method which involved action by the state as a unit is the practical construction placed upon section 2 of article I, which provides that, "the house of representatives shall be composed of members chosen every second year by the people of the several states," and that until enumeration shall be made, "the state of New Hampshire shall be entitled to choose three, Massachusetts eight, etc. There is certainly the same ground for contention that the authority given to a state to choose three or eight representatives involved action by the state as a unit as there is to say that the provision that each state shall appoint electors in such manner as the legislature

thereof may direct, requires action by the state as a unit, and yet from the time of the adoption of the Constitution the power of the state to provide for the choosing of representatives by districts has not been questioned, nor has the power to choose by an election at large been questioned (where no law of Congress intervenes), so that there has been the practical construction which has continued down to this day, which establishes that under the provisions of section 2, article I, the state having authority to choose representatives has the choice of methods and may elect by districts or *en masse*.

But it is urged that the fact that the district system has been abandoned is evidence from which it may be inferred that there has been a growing belief in the unconstitutionality of that method, and it is further stated in the beliefs of counsel that, "Any examination of the history of the methods of choosing presidential electors which approximates philosophic or scientific inquiry can only result in the conclusion that the states in coming to the use of the general ticket, by a common consent and practice, gave to the Constitution a construction and meaning which it might not otherwise now have, but which is nevertheless of the most conclusive and binding character.

There would doubtless be great force in the practical construction which has obtained for sixty years, even though not contemporaneous, if such construction involved of necessity a negation of the right claimed by the legislature in this case, but the fact that the several states have provided by their legislatures for choosing electors on a general ticket does not involve an assertion that the power to choose electors by districts does not exist. And in so far as the argument of counsel assumes that our Constitution is subject to growth it is in my judgment inconsistent with the purpose and duty to sacredly maintain the integrity of that instrument, to treat it as subject to modification except by the prescribed agencies and by the prescribed methods. And especially is it inconsistent with established rules to say that by non-user a commonwealth may lose the power to exercise rights expressly delegated in a written constitution. If under the Constitution and after forty years of practical construction the state had a right to choose electors by districts, it does not lie with any court to assert that that right has been lost to the state by non-user.

In *Bay City v. State Treasurer*, 23 Mich. 499, Justice Cooley, speaking for the court, said: "Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust when-

ever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power."

It has evidently not been the view of eminent statesmen either that the original construction of this section should have been such as to exclude the power of the legislature to adopt the district method or that that power has been lost by non-user, for as late as 1874 the committee on privileges and elections of the United States senate made a report in which, speaking of this section, it was said: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts as are members of congress, which was the case formerly in many states."

But it is urged that the act in question is in conflict with the fourteenth and fifteenth amendments, and it is said that at the time these amendments were adopted the method of choosing electors actually in vogue in all the states was by vote of the people at large for a general ticket, and that it is provided by the fourteenth amendment, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and also provided that, "When the right to vote at any election for the choice of electors of president and vice-president, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation shall be reduced," and as the fifteenth amendment providing that, "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude;" that these amendments are to be held to have relation to the conditions then existing, and that in effect they operate to repeal by implication so much of article II, section 1, as to prescribe the manner of choosing electors.

It would in our opinion be a strained construction which should give to either of these amendments the effect to annul the power expressly delegated in section 1 of article II. But here again we are not without the aid of contemporaneous construction. As already pointed out the committee of privileges and elections of the senate, composed as it was of men who participated in the adoption of these amendments, reported in 1874, in the most unequivocal terms, that this power still rested with the legislature. The question was also discussed by eminent members of the electoral commission of 1877. Commissioner Frelinghuysen, speaking of the power of the state to appoint electors, said: "Under this power the legislature might direct that the electors should be appointed by the legislature, by the executive, by the judiciary, or by the people. In the earliest days of the republic electors were appointed by the legislatures. In Penn-

sylvania they were appointed by the judiciary. Now, in all the states except Colorado, they are appointed by the people." Commissioner Hoar said: "Upon the whole matter, therefore, I am of opinion that the appointment of electors and the ascertaining who has been appointed is the sole and exclusive prerogative of the state. The same acts by such agencies as it selects." Justice Field said: "The Constitution declares that each state shall appoint electors in such manner as the legislature thereof may direct: . . . with the exception of those provisions as to the number of electors and the ineligibility of certain persons the power of choice on the part of the state is unrestricted. The manner of appointment is left entirely to its legislature. Mr. Justice Miller, Commissioner, said: "If elected by the legislature, as they may be, an appropriate mode (of certifying the election) would be the signatures of the presiding officers of the two houses to the fact of such appointment or a certified copy of the act by which they were elected."

In re Kemmler, 10 Sup. Ct. Rep. 934, it was said: "The fourteenth amendment did not radically change the whole theory of the relations of the state and federal government to each other and of both governments to the people." See also *Minor v. Happersett*, 21 Wall. 162.

It is very clear that the fifteenth amendment was intended to preclude the state from making any discrimination against citizens on account of color. No reasoning could make this plainer than does the mere reading of the provision, "The right of citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude." There is no attempt to place limitations upon the power of the state, except that in any case where the right of suffrage is involved, the class protected by this amendment shall not be discriminated against. Neither by the fourteenth nor fifteenth amendments was there any attempt to place limitations upon the authority of the state as to the choice of officers theretofore existing. Presidential electors are still regarded as state officers. *Fitzgerald v. Green*, 10 Sup. Ct. Rep., 586. And to hold that because at the time of the adoption of the fourteenth amendment the general custom was to elect by the states at large, that this secured irrevocably the right of each citizen 21 years of age to vote directly for the number of electors to which the state is entitled, would be to hold also that the method of choosing state officers, including judicial officers, which at the time of the adoption of this amendment obtained was irrevocable fixed beyond the power of the legislatures of the several states to change. We do not think the amendment is susceptible of this construction.

Does this act embrace more than one object, and, if not, is that object sufficiently expressed in its title? It is held that the provision of the Constitution requiring that the subject shall be expressed, etc., is fully accomplished when the statute has but one general object, and when the subject object is fairly indicated in its title. Every end and means necessary to the accomplishment of the general object need not be provided for by a sepa-

rate act relating to that alone. *People v. Mahaney*, 13 Mich., 431; *Kurtz v. People*, 33 Mich., 279; *Ryerson v. Utley*, 16 Mich., 270.

The title of this act is, "An Act to provide for the election of electors of President and Vice-President of the United States, and to repeal all other Acts and parts of Acts in conflict therewith."

It is said that the body of the act provides for the election of alternate electors as well as electors, and that alternate electors are not named in the title. It would hardly be contended that it was not competent under this title to provide for filling vacancies occasioned by the death or disability of one of the electors first chosen. This act in effect does no more than that. Technically also, alternate electors are before they become officials, vested with any functions whatever, electors. The sole object of their election is that they shall in a certain event exercise the function of electors. The question might be different if they were elected to a distinct office, having duties to perform and with a provision that they should have added to these duties the function of electors in the event of a disability of their principal.

It is also urged as an objection to the validity of this law that in case of the death or disability of both the elector and alternate that no provision is made for filling the vacancy and it is therefore claimed to be inoperative. But it is only necessary to say that if this be true, then any attempt to appoint electors would fail, for under the former statute existing in this state, and under all statutes vesting power to fill vacancies in the electoral college, death might intervene and prevent the exercise of that function.

Can the act be said to be inoperative and void because so defective as that its provisions cannot be given effect? It is first claimed that the law is defective in not requiring notice of election of the district electors provided for, but we think this criticism without force. Section 147 Howell's statutes remains in force and by the express terms of that statute the Secretary of State is required to give notice that there are to be chosen as many of the following officers as are to be chosen at such general election, namely: a governor, * * * electors of president and vice-president. The electors provided for in this act are to be chosen at this general election, and it is the plain duty of the Secretary of State to give notice of that fact.

It is next urged that the law is defective and inoperative, for the reason that no means are provided either by the act itself or the general law for canvassing votes in Wayne county. The general law, act 190, public acts of 1891, provides, by section 1, for inspectors of election for elections at which presidential electors may be voted for. Section 36 provides for a canvass of the votes. Section 38 requires duplicate statements of the result to be prepared, one copy of which is to be filed and the other delivered to the inspector appointed by the board to attend the county canvass. Section 184 and 185 of Howell's Statutes provide that the board of canvassers shall proceed to canvass the votes, and section 185 requires the statement of

votes given for electors of president and vice-president of the United States each year in which such electors are to be chosen. The act in question, in section two, provides that, "the counting, canvassing and certifying of the votes cast for such electors-at-large and their alternates and said district electors and their alternates shall be done, as near as may be, as is now provided by law for the election of electors of president and vice-president of the United States." The precise point appears to be that as the votes cast in the county for the presidential electors are cast in different electoral districts, that there is no provision for a separate canvass of the votes cast in each district by the board of canvassers. We do not see the least difficulty in applying the law. It would of course be the duty of the inspector to designate the district in which the elector is voted for. And as the district is defined by law there is no more difficulty in doing this than there is in the board of state canvassers crediting to the one entitled the votes cast in the proper judicial circuit for circuit judge.

The act in question is in conflict with the law of congress in so far as it attempts to fix a date for the meeting of electors and the method of certifying their action. Does this render the entire act inoperative? There is no doubt of the rule that where the law of a state conflicts with the law of congress in a matter in reference to which congress has the right to legislate, the state law must give way to the extent of such conflict. *Robinson v. Rice*, 3 Mich., 242.

The law is not necessarily inoperative *in toto* because in some of its provisions the legislature has exceeded its power. On the contrary the rule is stated to be that the unconstitutionality of one part of the statute cannot defeat other portions unless the nature of the unconstitutional provision is such as to render it of vital importance to the law. *People v. Mahaney*, 13 Mich., 431; see also *People v. Richmond*, 59 Mich., 570; *Attorney General v. Amos*, 60 Mich., 372; *Robinson v. Myner*, 98 Mich. 549.

This general rule is conceded, but it is contended that this statute furnishes evidence upon its face that it contains provisions which would have been adopted had it been within the understanding of the legislature that the provision relative to the date for the meeting of electors was inoperative. The statute providing as it does that, "In case two or more persons have an equal and the highest number of votes cast for any office created by this act as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the legislature in special session immediately upon such determination by said board of state canvassers." It is urged that if it had been understood that the legislature which is to be chosen at the same general election at which the presidential electors are chosen was to convene before the date when under the law of congress the electors are permitted to cast their vote, that it is not to be presumed that the legislature would have provided for convening the legislature in special session at large expense. But we are not able to

say, as matter of law, that this is true. The new legislature will sit but three days prior to the date fixed by the law of congress for the meeting of electors. Nor is it clear beyond question that it was not the purpose and intent of the members of the present legislature to retain the power of choosing the electors in case of tie rather than to commit it to their successors. We think there are evidences afforded by the act itself that such was their purpose. We cannot, therefore, say that this statute would not have been passed in the form in which it is without the provision relating to the time of the meeting of electors, and therefore are not justified in holding that the law is wholly inoperative because of the conflict of that provision with the law of congress upon the same subject.

We have considered the questions presented with the care which the exceeding importance of the issue seemed to us to imperatively require, and our conclusion is that the statute must stand as the lawful edict of the legislature.

Nearly seventy years ago Chancellor Kent wrote in regard to the election of the president, as follows: "The mode of his appointment presented one of the most difficult and momentous questions that occupied the deliberations of the assembly which framed the Constitution; and if ever the tranquillity of this nation is to be disturbed and its liberties endangered by a struggle for power it will be upon this very subject of the choice of a president. This is the question that is eventually to test the goodness and try the strength of the Constitution; and if we shall be able, for half a century hereafter to continue to elect the chief magistrate of the Union with discretion, moderation and integrity, we shall undoubtedly stamp the highest value on our national character and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration of the more enlightened part of mankind." 1 Kent, Com. 274.

The danger in this plenary power conferred by the constitution of the state upon its legislatures has been recognized by the wise and patriotic statesmen of all parties, and several attempts have been made in congress to secure an amendment requiring a uniform mode.

The language of Chancellor Kent was written shortly after a long debate in the United States senate over proposed amendments. *Annals of congress* for 1823-24, 176-375.

To the intelligence, wisdom and patriotism of our people is due the gratifying fact that the danger has thus far been averted, but the action resulting in the passage of the act in question, is a reminder of the danger which may at any time be precipitated upon the country for the purpose of obtaining political power.

The injustice of any other than a uniform system of electing the president of the United States is manifest. As has been recently well said: "It is of the first and last consequence and importance that in legislating upon this subject it should not be regarded from a party stand-

point." But neither the fact that this most important consideration may have been overlooked, nor that this legislation may result in serious injustice, can extend our jurisdiction or justify us in usurping functions which under the Constitution pertain to the legislature. As was said by Justice Cassady, in the recent case of *State v. Cunningham, N. W. R., 1,135*, "It is to be remembered that even praiseworthy objects cannot be rightfully obtained by a violation of law. Every effort to fritter away the plain language of the Constitution, by way of construction or otherwise, even to secure a desirable end, is nothing less than an insidious attempt to undermine the fundamental law of the state, and hence to that extent destructive of good government, besides being vicious in its tendencies. The writ should be denied. The other justices concurred.

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE, *Treasurer*,
ELI R. SUTTON,

H. D. JEWELL,
J. E. ROBERTS.

Published monthly. at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

Address all correspondence to MICHIGAN LAW JOURNAL, 24 Widdicombe Building, Grand Rapids, Mich.

THE *Harvard Law Review* for May gives an account of a very interesting and antique Massachusetts statute which it says was apparently enacted for the benefit of students. It provides that no inn-holder, tavern-keeper, retailer, confectioner, or keeper of a shop or house for the sale of drink or food, or a livery-stable keeper for horse or carriage hire, shall give credit to a student in an incorporated academy or other educational institution within the state. Another section provides, that any one giving credit contrary to this provision shall forfeit a sum equal to twice the amount credited whether the bill is paid or not. The *Review* apparently believes that this peculiar statute was enacted for the express purpose of aiding students to defraud creditors, since it is hardly possible that merchants would entirely abstain from all dealings on credit with students. The statute, it is true, soon became practically unenforceable. We think that it must have been the intention of the framers of the statute to render it impossible for students, away from home and parental supervision, to contract debts; being thus a protection to students but not in the sense apparently understood by the editors of the *Harvard Law Review*, i. e., that it would enable students to contract debts without any intention of liquidating them. The members of the legislature which passed this ancient law, evidently looked to the dealers and merchants to assist them in discouraging wastefulness among students.

THE lawyers of England are apparently dissatisfied with the common law definition of murder. The question of its amendment has recently been before the English Parliament, and in its discussion attention was called to the elaborate definitions of murder in the proposed bill relating to the criminal law of Canada. The bill is a lengthy and exhaustive one and it is evident that great pains have been taken in its preparation. This desire to alter the common law definition of murder is but one of those indications that the profession is awakening to the necessity of modernizing, if the phrase may be permitted, much in the law in general and in the criminal law in particular, that does not fit the present times. The criminal law has probably been the subject of more changes than any other

branch of the law. Moral criteria have vastly altered, social conditions have changed greatly and men's ideas of punishment have been considerably modified, in the progress of time. Professor J. C. Knowlton, in his lectures upon "Criminal Law," to the law students of the University of Michigan, says, "As showing the growth and wisdom of our present criminal law, in the recent English criminal law the offences punishable by death are reduced to seven in number, as contra-distinguished from the one hundred and sixty crimes punishable by death in early times. And of the seven, in more recent English history, but two are punishable by death, namely, treason and murder." With these changes in the degrees of punishment have come many changes in definitions. Take the word "crime" itself. There are a number of definitions of "crime," but they do not agree for manifest reasons. They have been made at different periods of the growth of the criminal law and consequently the conceptions and ideas of the writers and those who made definitions have been different. While it cannot be said that there is an absolute necessity for a change in the definition of murder, it is certainly true that more certainty in the description of the crime will be secured by a change such as that in the Canadian law.

Clause 222 of the Canadian law provides that, "Culpable homicide is murder (1) if the offender means to cause the death of the person killed, or (2) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not, or (3) if the offender means to cause death, or being so reckless as aforesaid means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed, or (4) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone. There is also a 'further definition of murder in clause 223 whereby' culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue or knows or does not know that death is likely to ensue, (a) if he means to inflict bodily harm for the purpose of facilitating the commission of 'treason, rape, robbery, and other specified offences' or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or (b) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or (c) if he by any means willfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.' Another lengthy clause opens with the words that 'Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation,' and proceeds in three elaborate paragraphs to define 'provocation.'"

TREATING JURORS.—The case of *Wilson H. Hicks v. Judge Hosmer*, mandamus to grant a new trial, before the Supreme Court of Michigan, presents a novel question. During the trial of *Hicks v. Schneider* before Judge Hosmer at Detroit, the jury examined the property in dispute and were treated to cigars by Schneider's attorney. A verdict for the latter was subsequently returned, whereupon Hicks asked for a new trial on the ground of the misconduct of the defendant's counsel. It was refused, and

Hicks immediately applied to the Supreme Court for mandamus orderign Judge Hosmer to grant a new trial. A new trial was ordered.

Very few cases of this kind are upon record, principally, we presume, because few lawyers have the temerity to experiment with juries in this manner. The statutes of the several states as a rule do not cover this method of influencing jurors, although they do provide with no uncertain emphasis for the bribing of jurors. The case of *Baker v. Jacobs*, 23 Atl. Rep., 558, commented upon in the MICHIGAN LAW JOURNAL for April, p. 104, is a case where the plaintiff, after a verdict had been rendered in his favor, treated the jury to cigars. This, according to the statutes of Vermont, where the case arose, was sufficient to entitle the defendant to a new trial. The statute (sec. 997) is as follows: "If a party obtaining a verdict in his favor shall, during the term of the court in which such verdict is obtained, give to any of the jurors in the cause, knowing him to be such, any victuals or drink or procure the same to be done, by way of treat, either before or after such verdict, on proof thereof being made, the verdict shall be set aside and a new trial granted."

A case is reported in 45 Fed. Rep., 542, (*Johnson v. Hobart*), where meals were furnished to the jury. When the jury were sent out it was suggested by the court that no provision was made by law for furnishing meals, and counsel were asked, if it became necessary to give the jury refreshments, whether the parties would share the expense. Defendant's counsel declined to do so. Meals were subsequently provided and paid for by the plaintiff, and it was held that verdict in his favor must be set aside. It does not appear here that the plaintiff furnished refreshments for the purpose of influencing the jury, but the case illustrates very well with what extreme suspicion the law regards the slightest act which might be construed as an attempt to bias the jury. The *Albany Law Journal* of June 11 cites an instance of treating carried to the extreme, which occurred in the United States District Court at Des Moines, Iowa, before Judge Woolson. The defendant in the case, a railroad vice-president, after having been acquitted of conspiracy, immediately invited the jury to a neighboring inn "to have a cigar," which turned out to be an elaborate banquet of many courses. The next morning Judge Woolson summoned the acquitted defendant and the jury into court and censured them severely for their conduct. Unfortunately the United States statutes do not provide for cases of this kind and the defendant escaped a new trial. Judge Woolson said that under the light of the transactions of the evening before, if he had the power he would unhesitatingly set the verdict aside and at the earliest moment possible put the defendant again on trial for the heinous crime charged against him. The judge turned to the section giving him power to punish for contempt and said he greatly regretted that he had as yet found no authority in it to enable him to deal with the defendant as he felt the occasion would justify.

NOTES AND COMMENTS.

IS A SETTLEMENT, IN THE NATURE OF A WILL, ILLEGAL BECAUSE EXECUTED ON SUNDAY?—This question came before the Supreme Judicial Court of Massachusetts, in *Donovan v. McCarthy*, reported in the *Central Law Journal* of April 20. The instrument which the plaintiff sought to have declared unlawful was an assignment of property in trust for the benefit, comfort and support of the assignee during life, for funeral expenses and a burial lot, and for the celebration of certain masses, the remainder to belong to the assignee. The assignee was a single woman, eighty years of age, who was taken to the city hospital an account of severe injuries. There, this instrument was executed on a Sunday. The assignor herself sought to have the instrument cancelled because it was executed on Sunday, which it was claimed was in violation of the public statutes of Massachusetts, ch. 98, § 2, which provides that "whoever on the Lord's day does any manner of labor, business or work, except works of necessity and charity" is punishable. The Court held that the assignment may be rightly considered a work "of necessity or charity" within the exception of the statute.

CARRIERS' RIGHT TO LIMIT LIABILITY FOR LOSS OF BAGGAGE.—Apropos to the interesting article in the May number of the *LAW JOURNAL* by Chief Justice Horton, on "Limiting the Liability of Common Carriers in Transporting Goods and Live Stock," comes the decision in the *L. N. A. & C. R. R. Co. v. Nicholai*, decided in the Indiana Appellate Court March 1, and reported in *Albany Law Journal* May 14, which contains the following abstract of the decision in the syllabus: "Defendant, a railroad company, sold a ticket to plaintiff, which entitled her to ride and have her baggage carried on defendant's railroad and other connecting lines from Portland, Ore., to Indianapolis. The baggage consisted of a trunk containing wearing apparel and other articles. The ticket provided that 'none of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$100.' On the arrival of the trunk plaintiff discovered there had been abstracted therefrom a sealskin cloak and other articles amounting to \$330. Held, that as defendant did not attempt to account for the failure to deliver the property, the jury were entitled to infer negligence, and it was liable to plaintiff for the full amount lost."

BREACH OF PROMISE OF MARRIAGE.—A singular case, that of *Shakelford v. Hamilton*, 19 S. W. Rep., 5, has been recently decided by the Supreme Court of Kentucky. The defendant contracted to marry the plaintiff but subsequently refused to fulfill the contract because of his unfitness to enter into the marriage relation. He had contracted syphilis, but after being treated by physicians who pronounced him cured, he promised to marry the plaintiff. Before the day set for the marriage the symptoms of the disease returned and he very properly, according to the

supreme court, declined to perform his promise to marry. The lower court, upon the theory that marriage was like any ordinary contract, decided that defendant was liable in damages for breach of the contract. The supreme court, however, viewed marriage as "a *status* that forms the basis of our entire social system, and in which society has more interest in preserving its purity than the parties to the agreement." It decided that the appellee could not recover damages. The court says: "The only American case we have found on the question is reported in 86 N. C., 91 (*Allen v. Baker*), the opinion delivered by Ruffin, J. In that case the defendant refused to comply with his contract, because he was afflicted with a disease similar to the one this defendant had. The disease was contracted before the contract was entered into, but the defendant had been advised, and in fact believed that he could be cured in time to enable him to fulfill his engagement. Acting in good faith, and from a conscientious conviction that his disease was incurable, he refused to comply with his agreement, and the court in that case said: 'We cannot understand how one can be liable for not fulfilling a contract when the very performance of it would in itself amount to a great crime, not only against the individual, but against society itself.'"

LIABILITY FOR COLLISIONS AT STREET RAILWAY CROSSINGS.—The Pennsylvania Supreme Court in *Carson v. Federal St. and P. V. Pass. Ry. Co.*, Appellant, reported in the *New Jersey Law Journal* for June, decided that it is gross negligence to drive in front of a moving street car so near as to make a collision inevitable; and that such conduct defeats an action to recover for self-inflicted damages. It may not be necessary to stop before approaching a street railway crossing, but it is necessary to look before driving on the track. The servant of the plaintiff in this case while passing along a street at right angles with the tracks, drove in front of a moving electric street car, without looking for the approach of the car. The driver testified, however, that he listened for the sound of a gong, but the court decided that he was guilty of contributory negligence and could not recover. The introduction of electricity as a motive power on street railways has already occasioned considerable litigation. In commenting upon the increased care made necessary by the use of electricity the court says:

The street railway has become a business necessity in all great cities. Greater and better facilities and a higher rate of speed are being constantly demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a higher measure of care necessary, both on the part of the street railways, and those using the streets in the ordinary manner. It is the duty of the railway companies to be watchful and attentive, and to use all reasonable precautions to give notice of their approach to crossings and places of danger. Their failure to exercise the care which the rate of speed and the condition of the street demand, is negligence. On the other hand, new appliances rendered necessary by the advance of business and population in a given city, impose new duties on the public. The street railway company has a right to the use of its track, subject to the right of crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily

from six to nine miles per hour; but it is necessary to look before driving upon the track. If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly non-suited; *Marland v. R. R.* 123 Pa. 487.

ORDINANCE REGULATING RUNNING OF STREET CARS ALL NIGHT, REASONABLE.—The case of *The Mayor etc. v. The Dry Dock R. R.*, in the New York Court of Appeals and reported in the *Chicago Legal News*, decides that an ordinance of the common council requiring street cars to run, at least one car every twenty minutes both ways, between the hours of twelve, midnight, and six in the morning, is presumptively a reasonable regulation, and the burden is upon the railroad neglecting to comply therewith to show that it is unreasonable, and non-compliance cannot be excused on the ground that the operation of cars all night is unprofitable.

The street railway company failed to comply with this ordinance, and a penalty of \$100 was recovered for its violation. The defendant company was the assignee, and owner of the rights, privileges and franchises conferred upon a street railway company, and in the act of the Legislature creating it was this section:

"SECTION 2. Said railroad shall be constructed on the most approved plan for the construction of city railroads, and shall be run as often as the convenience of passengers may require, and shall be subject to such reasonable rates and regulations in respect thereto as the Common Council of the city of New York may, from time to time, by ordinance prescribe."

The defendant company claimed that in passing the ordinance, the Common Council violated the contract between the state and the defendant, but the court held that the ordinance did not, if it provided such rules and regulations as were "reasonable." Inasmuch as the ordinance, according to the evidence, was not deemed unreasonable, it was held to be valid. The court said: "Whether this ordinance should apply to the defendant would depend upon whether the defendant has succeeded in proving it was an unreasonable regulation, in its particular case. If it could prove that, when obeying the ordinance, upon a fair trial of the regulation, that few, or no passengers were carried, the judge might, and possibly should, find that the regulation was an unreasonable one, and therefore should not be enforced. With the evidence upon the subject before him, it would be for the judge to decide upon the question of the reasonableness of enforcing such an ordinance."

LATE DECISIONS OF THE MICHIGAN SUPREME COURT.***FINEGAN v. THIESEN.—June 10.—(McGrath, J.)**

Duress—Confidential Relation of Priest and Parishioner.—A court of equity will set aside a trust deed obtained by a priest from a parishioner when the facts show that the entire claim that the priest had to the property was under an invalid will, and which fact he concealed from the parishioner. Such confidential relation cannot be used for the gain of the church.

In re SEEGER.—June 10.—(McGrath, J.)

Dower—Assignable from Profits of Unopened Mines.—Where a husband in a sale of lands reserves his right to open any mines thereon and receive the profits therefrom, and such mines are unopened before his death, but are afterwards, the the widow is dowable of such profits that accrue from them. The strict common law rule asserted in *Stoughton v. Leigh*, 1 Taunt., 402, does not obtain in the commonwealth of Michigan.

BURRITT v. VILLENNUE.—June 10.—(Montgomery, J.)

Account Stated—Evidence—Questions for Jury.—In case of disputes as to settlement of accounts it is a question for the jury to determine whether it was understood between the parties that the account between them was stated, and whether payment in accordance therewith has been made. Such an understanding if found should bind the plaintiff in absence of fraud or mistake. (*Rayburn v. Lumber Co.*, 57 Mich., 275.) *Romeyn v. Campau*, 17 Mich., 327, distinguished.

GRIMES v. BOWERMAN.—June 10.—(McGrath, J.)

Evidence—Damages in an Action for Malicious Suing out of an Attachment.—Where a partner brought an action against a creditor of the firm, who in collusion with another partner of the firm had sued out an attachment to injure the business of the firm, it is competent to show the conspiracy by inference from facts and circumstances, and not by direct proof, that in consequence of the attachment the credit of the firm was destroyed and the business broken up, and that the levying of other subsequent attachments in consequence of the first and malicious attachment contributes to the injury.

LITTAUER v. HOUCK.—June 10.—(Long, J.)

Notice of Chattel Mortgage—When will Excuse Filing—Notice to Agent or Attorney.—Actual knowledge or notice of the existence of a chattel mortgage, prior to the time any suit was brought upon the claim for which judgment in execution has been entered, by an agent or attorney, will be considered as knowledge of the principal, when such knowledge came to the agent in a manner that he might communicate it to his principal or act upon it without being guilty of any violation of duty. *Brown v. Brabb*, 67 Mich., 17, followed. *Buhl Iron Works v. Teuton*, 67 Mich., 323; *Corlett v. Littlefield*, 84 Mich., 30, and *Dempsey v. Pforzheimer*, 86 Mich., 652, distinguished.

MCDONALD v. MCKINNON.—June 10.—(Long, J.)

Trover—When May be Brought for Shares of Stock—Liability of Agent for Fraud.—Trover will lie for shares of stock when there is sufficient evidence tending to show conversion as to constitute a question for the jury to determine. (*Morton v. Preston*, 18 Mich., 60; *Daggett v. Davis*, 53 Mich., 38). Although as a general rule, an agent of a company cannot be held liable for the acts of negligence of the company itself, yet if he is charged with fraud and deceit, as in representing that certain stock has been burned and refused to deliver it upon demand after it had been earned under a contract, the other stockholders having consented to its delivery, the agent, and not the company, is responsible.

* A large number of Michigan Decisions were crowded out, but will appear in our next issue.

A Question of Saving

Hundreds of Dollars

IS WORTH A MOMENT'S ATTENTION.

DECISIONS has been adopted
Vol. 10 of MYER'S FEDERAL

This is How 'Tis Done—

U. S. Supreme Court,
U. S. Circuit Courts,
U. S. District Courts,
U. S. Court of Claims,
U. S. Territorial Courts,
U. S. Circuit Court, Dist. Columbia
U. S. Attorney-General Decisions,
U. S. Internal Revenue Decisions,
And all Law Journals.

1790

TO

1884

ALL THESE REPORTS
TOPICALLY ARRANGED,
30 Vols., 30,000 pages

—IN—

MYER'S FEDERAL DECISIONS,
FOR \$150.

Adding U. S. Supreme Court to 1891, all for \$180; or

U. S. Supreme Circuit and District to 1891 for \$235.

HERE IS THE SAVING:

The above invaluable Reports, in any other form, when they can be had, cost over

\$1,100.

A BEAUTIFUL ILLUSTRATED CIRCULAR

Of 64 pages, gives all particulars; sent free.

A NEW BOOK.

A NEW SUBJECT.

VESTED RIGHTS, 1891.

By WILLIAM G. MYER, Editor of "Federal Decisions."

An able discussion of the great principles involved and their practical application. About 800 pages. Price, postpaid, \$6.00.

THREE
OTHER
GOOD
BOOKS

WEBB ON RECORD OF TITLE, Late Edition ; \$6.00.

MURFREE ON SHERIFFS, \$6.00.

MILLS ON EMINENT DOMAIN, \$5.00.

GILBERT BOOK CO., St. Louis.

as a text-book in the Columbia Law School, of New York.

MICHIGAN LAW JOURNAL.

VOL. I.

AUGUST, 1892.

No. 7.

ANNUAL MEETING OF THE MICHIGAN STATE BAR ASSOCIATION.

The second annual meeting of the Michigan State Bar Association was called to order by the President, Mr. Thomas J. O'Brien, of Grand Rapids, in the circuit court room of the Kent county court house, Grand Rapids, Michigan, at 2:20 o'clock on Tuesday, July 26, 1892.

On motion, Ralph Stone, of Grand Rapids, was elected temporary secretary, in the absence of the Secretary of the Association.

Dallas Boudeman, of Kalamazoo, moved that a committee of three be appointed by the president to consider and pass upon applications for membership which may be proposed at this meeting, and that the rules or by-laws of the Association covering the admission of applicants be suspended. The motion prevailed. The president then appointed as such committee Dallas Boudeman, of Kalamazoo, M. Brown, of Big Rapids, and E. D. Barry, of Grand Rapids. The committee then met for the purpose of considering applications for membership, and reported the following names of applicants and recommended their admission:

John W. Champlin, M. M. Houseman, George Hefferan, F. W. Stevens, A. W. Johnston, H. D. Jewell, Ralph Stone, Elmer E. Stanton and Martin Rozema, Grand Rapids; C. C. Hopkins Edward Cahill and Mason D. Chatterton, Lansing; W. D. Totten, Kalkaska; L. N. Keating and Thomas C. Clark, Muskegon; George W. McBride, Grand Haven; John H. Palmer, Big Rapids; R. B. Pealer, Three Rivers; Hugh P. Stewart, Centreville; Benj. F. Heckert, Paw Paw; H. Hart and P. Padgham, Allegan; H. E. Winsor, Marshall; L. T. Durand, Saginaw; and W. D. Leonardson, Fremont.

On motion of W. H. H. Russell, of Detroit, the report of the committee was adopted and the applicants were declared elected.

PRESIDENT: The first order of business laid down by the rules which were temporarily laid aside in order to allow the committee to report upon applicants, was the reading of the annual address of the President of the Association, which the Constitution makes it his duty to present.

*"Gentlemen of the Michigan State Bar Association:—*There is probably no State in the Union which can boast a better Bar than that of Michigan, nor one in which the members of the legal profession have a higher regard for all that is best in legal practice. In the hurry of individual employ-

ment we sometimes overlook the great obligation resting upon the legal fraternity to suitably influence the rules and regulations governing society. These rules and regulations are the laws—so-called—both written and unwritten, which from time to time are found necessary. All plans and theories which have been attempted in the past by which the human race may live in communities without such rules and regulations have been failures, and in well regulated society everywhere human selfishness must be curbed, the weak must be protected against the strong, and the poor against the avarice of the rich. It is not only suitable therefore, but it is a duty resting upon the lawyers of a State having attained the age of Michigan, to meet at intervals and reason together with a view to the abrogation of useless and vicious laws, and to recommend such reforms as their united experience may suggest. The members of the profession in Michigan have been slow in recognizing this duty, while in the meantime those of other States have been active and successful in the directions indicated. It is stated in our Articles of Association that 'The objects of said association shall be to maintain the honor and dignity of the profession of the law, increasing its usefulness in promoting the due administration of justice, and cultivating social intercourse among its members.' A year ago my predecessor, at the first annual meeting of our society, congratulated the members on the auspicious beginning, and expressed the reasonable hope that interest would be taken in the purpose and objects of the association. Commensurate with what might well be accomplished in this connection, he said, 'The immense power for good which the profession holds is contracted, because it is now almost wholly used to attack laws, and scarcely ever to frame them. If the influence of the profession be given, first to the preparation and passing of wise and just laws, and then to their proper and correct administration, the self-government of a free people will soon reach the utmost human limit of perfection.'

"On this second anniversary of our organization I am still further encouraged for our future by the attendance of members and the interest which they take in the possibilities of the future. It has been customary in the past for lawyers and others to disregard, for the most part, the proceedings of the Legislature, contenting themselves with afterwards complaining of the useless, unnecessary and sometimes vicious laws which are passed. Complaints of this character ought not to be heard; at least not unless the members of the profession, through individual effort, or better still, through the united effort of an association like this, have brought to bear their influence and their wisdom in the common good. Since our last annual meeting, there has been no session of the Legislature, and I have therefore no especial acts of that body to bring to the attention of the Association. At our last meeting a report was made by the Committee on Legal Education and Admission to the Bar. The length of time afforded at that meeting was not sufficient to enable the members to formulate any suggestion based upon the report, nor even to discuss it at

any considerable length. The time, however, has come when it seems to me active measures should be taken through this Association for a reform in this direction.

"The method of admitting to the Bar heretofore has been so simple and informal as to amount to little more than a farce. The greater number are admitted through the Circuit Courts, where, upon application being made, two or three busy attorneys are called in to question the applicant and pass upon his fitness. However able or successful the members of such a committee may be, they are not suitably prepared to conduct such an examination. The subject has received considerable intelligent attention at the hands of the American Bar Association, and through a committee of that body much valuable information has been collected. It has ascertained that in nearly all of the States a fixed period of study is required before application for admission, and in nearly half the States admission is made only by the Court of last resort. The loose manner in which students—so-called—are permitted to come to the Bar, results in loose notions as to the duty of the members of the Bar when they are admitted. The tone of the profession is thus lowered, and not only are incompetent persons permitted to do much mischief, but dishonest ones are also free to prey upon an unsuspecting clientage. I can do no better in this connection than quote from the masterly address of David Dudley Field to the American Bar Association, two or three years ago. After commenting upon the true place in an American Commonwealth of the lawyer, he proceeds:

"'The training and discipline of lawyers in our American system, and their notions of duty and honor, are therefore matters of concern to the whole body politic. And for the lawyers themselves, whatever may tend to elevate them in their own just estimation, and in the just estimation of the public; whatever may enable them the better to understand their true calling and prompt them to fulfill it, should be the study of their lives. It matters little whether we call the profession a public office or a private office for a public purpose, for we know that its members receive at the outset commissions from public authority, and that their duties are three-fold—to their clients, to the courts and to the State. We are accustomed and proud to believe that our profession is one of the great conservative forces of society; that it forms a group around the judges, serving the double purpose of oversight and defense, and that it cherishes the sentiment of honor as religiously as it was ever cherished in the foremost ranks of the profession of arms. In the incessant conflict between law and lawlessness, an immense majority of lawyers have always stood on the side of law.'

The subject thus being brought to the attention of the American Bar Association, a committee reported at the following session. Meantime the rules and regulations governing the admission of members of all, or nearly all the States was obtained, from which it appears that the rules in Michigan are more loose and the result the least satisfactory of almost any of the

States. As a result of the information obtained and the discussion which followed, resolutions were adopted, two of which I will quote:

“Resolved, That the American Bar Association strongly recommend that the power of admitting members to the Bar, and the supervision of their professional conduct, be in each State lodged in the highest courts of the State; and that the examination of candidates be referred to a permanent commission, appointed by the court, in order that a full and systematic knowledge of elementary law may always be exacted as a condition of admittance.

“Resolved, That at least two years of study should be required of every student before he present himself for examination; and that in the older States, having a more settled and comprehensive jurisprudence of their own, this limit should be extended to three years.’

“I earnestly recommend a reform substantially in harmony with the foregoing resolutions. The matter of expense to the State would be very unimportant and not to be mentioned in connection with the incalculable good which would follow. I would not only place in the Supreme Court the power of appointment of this commission, but I would make their period of service a term of years with the commission so adjusted that a part only should go out at the end of each year. A commission so composed would soon become well trained, and public sentiment would require them to be vigilant in the performance of their duties. I do not mean that there should be any special standard of previous training in the public schools and colleges. In other words, I would not expect applicants to be graduates of literary institutions of learning, but I would require them to have at least a good English education, wherever obtained, and that they should be thoroughly well-grounded in the fundamental principles of the law.

“There is another subject as to which this association can be a factor of real good. I refer to uniformity among the States in certain well known laws. My predecessor in his annual address drew attention to one of the most important of them—the subject of marriage and divorce. But there are others also important as to which there is no natural or artificial reason preventing perfect uniformity among the several States; as, for instance, besides the subject just mentioned, insolvency, forms of notarial certificates, acknowledgment and execution of deeds, execution and probate of wills, and descent and distribution of property. These matters were brought to the attention of the last Legislature, and a joint resolution was adopted providing for the appointment, by the Governor, of a commission whose duty it should be to meet and confer with representatives of other States, in convention or otherwise, to draft uniform laws for submission and adoption, and to advise and recommend to the Legislature such other course of action as should best accomplish the purpose indicated. Acting under this joint resolution, the Governor has appointed three representative members of the Bar, and I have no doubt they will be active in the performance of

the duty assigned them, and that their good work will bear fruit at the next meeting of the Legislature. I recommend, however, that a committee of this association take in hand the same subject matter and give to the commission such assistance as will best bring about the desired result.

"There has been an attempt for several years to induce Congress to enact a uniform system of bankruptcy. Such a system is most beneficial to the citizens of older States, especially those engaged in commercial pursuits requiring the giving of extensive credits in remote sections. It may well be said that Michigan has reached a point in age and commercial activity when it would be a real gainer by the existence of such a law. It is true that Congress is loth to put upon the country a system which in the past has proved to be an utter failure. But it seems to me that through the courts of equity of the United States, already established, such a law could be enforced and administered for the benefit of the creditor and debtor class alike. In addition to the well settled practice of those courts, a power to discharge in suitable cases, and some regulations touching the procedure, would alone be needed to make such a law effective. I submit the matter to the attention of the Association for consideration.

"Tenure of Office of Judges.—I desire to bring to the attention of the Association, without recommendation, the matter of the selection of our judges and the tenure of their offices. The judiciary is one of the three powers under our system of government, and to the common mind stands in the same rank as the other two. It is notorious, however, that it is the weaker of the three, as it is very largely under the control of the Legislature, and by its very nature can only act upon matters brought before it by litigants and the public officers. As has been well said 'It has no influence over either the sword or the purse; no direction of either the strength or of the wealth of society, and can take no active resolution whatever.' On account of its inherent weakness, and its inability to make itself aggressively and affirmatively felt in the State, and in order that its functions may be exercised with the utmost independence, the State should throw around the Judges the fullest protection, and free them as far as is possible from personal obligation either to the executive, the legislature or the citizen.

"When it was decided to have an elective Judiciary, fears were entertained in some quarters that the system would be destructive of the independence of the Judges. I doubt whether this has been the case, and while a number of the States, as well as the United States, adhere to the plan of an appointive judiciary holding office during good behavior, a majority of the States elects them. Michigan has adopted the elective system, and it is doubtful if the people would vote to substitute the other plan. At the same time it may be considered whether the tenure of office is not too short. Under the elective system we should mitigate as far as possible the personal obligation of the Judge to the litigant and to political parties, and leave him wholly free in the exercise of an honest judgment, unprejudiced and unbiassed by fear or by favor. I suggest that the

Judges of our Supreme Court should hold their offices for a period of at least fifteen years, and that they should not be eligible to re-election. The suggestion is made for the consideration of the Association.

"Verdicts in Jury Trials.—All practicing lawyers have seen the absurd results often attending trials by jury. After the parties to a suit have spent a large amount of time and money in the preparation and trial of a cause, it sometimes happens that a minority of one or two jurors defeat a final decision, and that, too, upon some absurd theory or reason not legitimately in the case; or perhaps a reason which he could not safely state. We are content in our appellate courts to have causes finally disposed of by a majority of the judges; in arbitrations, made up usually of three persons, we are content to have the concurrence of two; and yet in an unwieldy body, composed of twelve untrained men, we require that all should concur in a verdict. It is notorious that in many cases it would be infinitely better for all concerned if the jury could agree upon a verdict, even though some men might think a mistake had been made. A large percentage of the cases submitted to juries do not warrant the expense of a second trial, and I fancy a defeated party would be just as content if the verdict should be by, say nine of the jurors as if all had concurred.

"Under our present system, one mind may be equal in weight to the remaining eleven; a plan which permits one man, through motives of dishonesty, or through stupidity, to defeat the united efforts of eleven others. As has been said, 'Any one juror gained and properly armed with the necessary degree of patience suffices.' I firmly believe, therefore, that in this respect there should be a change, and that in jury trials a verdict by less than the whole number should be acceptable.

"Legislative Sessions.—Under our present laws, the Legislature must assemble early in January, and may continue in session as long as the sweet will of the members dictates. There is, of course, a certain amount of legitimate business which calls them together, but I doubt whether this duty need, or should be allowed, to occupy more than four months. Apart from everything else, the Legislature is an expensive body, and in late years especially the method of the members in failing to promptly attend to what there is to do, and in continuing the session beyond all reason, has come to be an abuse and a by-word. It is explained that a large part of the time is occupied in passing upon amendments to the charters of municipal bodies. In some of the States, a uniform law in respect to municipal charters has been adopted and has been found satisfactory. The right of the people of a town or city to go to the Legislature each year and wrangle over proposed amendments is of doubtful value to the municipality in question. On the other hand, if brought under the uniform plan the public business could be much more readily performed, a vast amount of litigation would be avoided and the people in interest would be far better off. But, if special charters are still to be tolerated, then there is no sense in vesting in the Legislature power to grant, alter and amend them. It would be

much more simple, inexpensive and satisfactory to provide a commission or a committee, which should have power over the whole subject, and thus avoid the excuse for at least sixty days session of the Legislature. It may require a constitutional amendment to bring about the change and to place a limit on the length of each session, but unless the subject shall be agitated the relief will never come.

"Relief of the Supreme Court.—The people of this State have been especially fortunate in the personnel of the Judges of its Court of last resort. They have not only been men of high character, great learning and undoubted integrity, but they have also, to the last degree, been industrious in the performance of their duties. Within the last ten years, however, the business of the Court has so far increased that it has been physically impossible to decide all the cases promptly and at the same time give to them that consideration which should be given by the court of last resort in a great State, and which the litigants have a right to expect. The members of this Association present at our last annual meeting were greatly interested in a paper read by Chief Justice Champlin on this subject. He had been a member of that Court for eight years, and at the time I speak of was about to retire from membership. His statements of fact and his words of warning were startling to most of those present; but I know of no steps since taken to remedy what is a confessed evil. It might have been better if the Court had long ago ceased the struggle to keep up with the business, and had brought the people of the State face to face with the situation. Instead of doing this, however, they sacrificed their own notions of ease and comfort, and have struggled on, embarrassed by the ever-increasing amount of business and the responsibility resting upon each member to give to each case full consideration and his best judgment. Permit me to quote a few words from the address of Justice Champlin, referred to. Speaking of the Judges, he says:

"They are conscious of the great responsibility resting upon them but it is, under present conditions, impossible for each Judge to examine each case with that care which enables him to determine the exact facts and law which are developed by the record, as was the case from 1867 to 1875. Instead of having the careful, conscientious opinion of each judge upon a case so that it reflects clearly and unmistakably the opinion of the united court, it is the opinion mainly of the judge to whom the case is assigned."

"Since that paper was read the situation has grown from bad to worse, and the Court has given up all hope of keeping up, adjourning the April term without finishing its calendar. The June term simply left the matter in a worse condition still. The explanation is found in the increase of business, and it is the duty of the Legislature to provide some remedy for the future. In other States, under like conditions, there has been delay in providing a prompt remedy, and the result has been a most abominable evil. In some of them, commissions have been appointed to bring up the

work in arrears, but even this plan is not only unsatisfactory, but it provides no permanent relief. It has been suggested that the business of the Court of last resort must be decreased. There are one or two different methods for bringing this about.

"As a rule, Circuit Judges are not overworked. In fact many of them could do much more, and I have no doubt would undertake additional labor with greatest good will. The State might be divided into judicial districts, and three or more Judges could sit together, and in a summary and inexpensive way listen to appeals in all cases where the amount in dispute should be less than, say \$500. It would seem that an Appellate Court of this character would come as near doing justice in any given case as the Supreme Court is now able to do where the chief consideration of each case is limited substantially to the Judge who writes the opinion. Of course in special instances, cases might be sent to the Supreme Court; but with this exception the decision of the Appellate Court should be final. It has also been suggested that an Appellate Court, with jurisdiction substantially like that above pointed out, might be created, the Judges of which should be elected independently of, and in addition to, the present system of Circuit Judges. The objection to this plan would be largely the additional expense to the State, although this objection ought not to stand in the way if the plan would be more effective and satisfactory. It should be borne in mind that our Appellate Courts are, at the most, inexpensive and the State can well afford to take on this further burden rather than that the citizens should be denied speedy justice.

"Still another plan has been suggested by which the system should remain as at present, and the relief come through an additional number of Justices of the Supreme Court. This plan would also be inexpensive, and if otherwise satisfactory to the Bar and to the people, commends itself, because it is in perfect harmony with our present plans, and would not involve the introduction of a new system, with its attendant complication and expense. I fear, however, that if there should be no minimum limit of jurisdiction the business of the Court will so increase that in a few years not even seven or nine Judges will be able to perform it all. If in the judgment of this Association, that result is likely to follow, it may be better to recommend at once the plan for an Appellate or Intermediate Court.

"In conclusion, allow me to suggest that this Association can be made more effective if the meetings can be more numerous attended, and the sessions be of greater duration. The suggestions which I have just made in this address, if deemed worthy of consideration at all, cannot be intelligently considered nor a satisfactory conclusion reached in the limit of time afforded by a single afternoon. I have observed that in other States, from two to three days are occupied, and that the meetings are held, for the most part, at places adapted to furnish entertainment and social enjoyment to the members in attendance. As, for instance, the practice of the Asso-

ciation in Ohio is to meet at Put-in-Bay. It is worth considering whether we ought not to take a similar course and meet at one of the great number of delightful places of resort which our shores furnish.

"The matter may safely be left, with the suggestion I have made, to the Board of Directors to be elected, and I beg that that board will consider that it has an obligation resting upon it and a real active duty to perform. From the efforts of the executive officers chiefly can the Association be made a real success and a permanent instrument of good."

In connection with the President's address, and as bearing upon some of its recommendations, the President read letters from Hon. Alfred Russell, of Detroit, and Justice McGrath, as follows:

My Dear Mr. O'Brien:—At the last moment circumstances have arisen preventing my attendance at the Bar Association to-morrow, to my great regret. If present, I should amplify the following four points—*two* for the Legislature and *two* for the Court itself:

1. Fix a limit of \$500 to the right of review in the Supreme Court, except where special leave is granted. This would reduce the business *one-third*. Nearly all the States have a limit. In Louisiana it is \$2,000.

2. Repeal by Constitutional amendment, Sec. 10, Art. VI, Constitution requiring a written decision and its reports *in every case*. Of our 88 vols., 44 are in the *last twelve years*.

3. Restrict the original writ of *mandamus*, now employed, even in criminal and equity cases, to its *common law use*, i. e., where no other remedy known to the law exists.

4. Adopt the Wisconsin practice abolishing *Bills of Exceptions*. Certify up the stenographer's notes, *in full*, not to be printed; and require the party removing the cause to prepare a *case* to which the opposite party may prepare amendments the case and amendments to be printed.

Not only would the Supreme Court be enabled to handle its business, but the importance and character of the Circuit Courts would be increased, and they would not be as now, often mere channels through which to get to the Supreme Court.

Yours very faithfully,

ALFRED RUSSELL.

My Dear Sir:—I am in receipt of your favor of July 19, requesting my presence at the meeting of the State Bar Association on Tuesday next. As you are aware, Court meets on Wednesday, and I am very anxious to get my work up before that time, and cannot go unless at the expense of that work, therefore I must decline, much as I would enjoy being present. Please make my excuses known to the Association.

You request me to present some measure of relief for the Court, and if you will pardon me I will suggest what I deem the most feasible plan. First, let me present some of the difficulties. At the last January term we had 54 applications for *Mandamus*—42 orders to show cause were issued, and that number of arguments heard, and we had 3 applications for *Habeas Corpus*. At the April Term the number of these matters was larger, but at the June Term it was less. At least one-half of our time out of Court, while at Lansing, is given to the consideration of these matters, many of which involve important interests. The result is, that when we reach the hearing of calendar causes, we are not as familiar with the records as we should be, hence can look wise, but are unable to suggest the line of argument as we otherwise might. Hence in the less important cases much more time is taken up than ought to be, or than would be, if we could direct the argument, and in the

more important cases, much time is taken up in getting a skeleton of the case before us, and we are unable to suggest points to which counsel would devote themselves more at length if they could hear from the Court.

I know that arguments would be more beneficial to us, and believe they would be far more satisfactory to the Bar, if in advance we had a better understanding of the facts in the case presented and of the questions raised by the record. So long as all members of the Bench sit continuously this same difficulty will present itself. I am not in favor of compelling the submission of cases upon briefs. Oral arguments, if they can be directed to the doubtful points, and to our own authorities, are a very great aid to the Court. My own view is that the number of Justices should be increased to nine, and that five should constitute a quorum. Four members of the Bench would then be preparing the hearings, as well as writing up, while the other five would be upon the Bench, and the Court would sit until the docket was disposed of. The applications for Mandamus would be examined by those not sitting for that week and heard by them the next week. Under this system I have no doubt that in the same time we could accomplish more work, and what is more important, much better work.

Our State is growing in population, and in the volume of its commercial and industrial interests. A large amount of business has been unloaded from the Federal Court into this Court. The 49th Mich. closes up the year 1882, the 89th brings us up to January, 20, 1892. We have heard 360 Calendar Causes since January 5, 1892 in addition to 150 other matters, some of which have been of great public concern and importance. We ought not to try to do more, because it is of the utmost importance that the work done by the Court be well done.

To the members of the Bar I would suggest, shorten your Bills of Exceptions; give us in your brief a succinct statement of the case; index your records fully; marshal your exhibits, and refrain from reading briefs. However, I am satisfied that much less time would be spent in reading briefs if the Court was in a situation to direct the line of argument.

It is a source of gratification to me, as I know it is to my associates, that the Association appreciates the situation of the Court, and that so many members of the Bar are engaged in devising ways and means to relieve the Court and promote the interests of the public. Very truly,

JOHN W. MCGRATH.

At the conclusion of the President's address, the Association, upon motion, proceeded to discuss that portion relating to the relief of the Supreme Court. The discussion was opened by Hon. Edward Cahill, of Lansing.

MR. CAHILL: *Mr. President, and Gentlemen of the State Bar Association:—* When your President wrote me, a few days ago, calling my attention to the fact that the Bar meeting had been postponed to the 26th, he asked me to prepare myself to make some recommendations regarding the business of the Supreme Court. I promised him then, that if I was present, I would take such part in the discussion as I was able to take. I have put such recommendations as I had to make in writing, and have them here. It will take but a few minutes to read them, and I think by so doing I will save your time.

The condition of business in the Supreme Court of this State is such as to demand of the people, and especially of the Bar of the State, a careful inquiry as to how the Court and the people may be relieved. It is not a question which affects the Court alone or chiefly. There is no duty resting upon the Court to keep up with the business of the State unless it can be done without lowering the high standard of which the people have a right to expect from the Court of last resort, and also without such extraordinary labor as will impair the health of the Judges. No man is

bound to work any harder for the State than he is for himself and his family. But while there is no duty resting upon the Court to keep up with the business of the State, it is a matter of the highest importance to the people of the State, whose rights of person and property are to be adjudicated by the Court, that such reforms should be adopted as will enable the Court to keep abreast of the business. The law's delays amount sometimes to a practical denial of justice.

The population of this State in 1861 was, in round numbers, 750,000. The number of cases decided by the Supreme Court that year was, at the January term, 8; April term, 12; July term, 7; October term, 19; total, 44. The population in 1871 was, in round numbers, 1,200,000, and the number of cases decided in the Supreme Court was, at the January term, 28; at the April term, 27; July term, 23; October term, 19; total, 97. The population in 1881 was, in round numbers, 1,700,000, and the number of cases decided in the Supreme Court, at the January term, was 106; April term, 71; June term, 93; October term, 107; total 377. The population in 1891 was, in round numbers, 2,200,000, and the number of cases brought to the Supreme Court that year, including motions, was 829. The number of cases decided by the Court was, at the January term, 114; April term, 125; June term, 107; October term, 123. In addition to this there were 28 opinions in motions; total, 497. A comparison of these figures, relating to the population, will show that the State increased in population about one-half a million in each decade. A like comparison of the business of the Court will show that it has increased in a much greater ratio. The increase in population from 1861 to 1871 was 66½ per cent; the increase of business in the Court was 97 per cent. From 1871 to 1881 the increase of population was 41 per cent; the increase of business in the Court was 185 per cent. From 1881 to 1891 the increase of population was 77 per cent; the increase of business in the Court was 120 per cent.

If four judges were necessary to do the business of the Court in 1861, no further argument is required than a bare statement of the facts to show that five judges are not sufficient to properly dispose of the present business, and that any attempt to keep up with the business of the State must be at the expense not only of the standing of the Court but of the interests of the people.

The question then is, what shall be done? Three plans have been discussed:

1. It has been proposed that the right of appeal to the Supreme Court in cases involving small amounts should be entirely cut off. I have not made an investigation as to the number of cases coming to the Supreme Court where the amount in controversy was very small—say under five hundred dollars. It is hardly practical to make an estimate as to the amount of business that would be cut off by fixing the limitation to that or any other amount. Nor do I think that such an investigation would be of any particular benefit. The people have a very decided opinion against limiting the right of appeal and it is very questionable if a bill could be passed through the Legislature for that purpose. Efforts have been made in that direction at several sessions, but I think none of the bills have ever passed the committee of the whole. The argument is that to deny the right of appeal is to create in the Circuit Court an arbitrary Judge, whose decisions would be regarded as particularly oppressive because of the fact that they could not be reviewed. It is claimed that to deny an appeal is opposed to the practice and tradition of Anglo Saxon justice. From the time of the *Aula Regis* to the present, the rule in civil cases has been, in England and America, to give to every litigant who feels himself aggrieved by the judgment of an inferior court, the right to appeal to a superior. Chief Justice Jay, in a letter to President Washington, in relation to the duties and powers of the Supreme Court, then just inaugurated, used this language: "A celebrated writer has said that 'next to doing right, the great object in the administration of justice should be to give public satisfaction.'" The right of appeal secures, or helps to secure that end.

2. Another plan that has been discussed and that has been adopted in some of the States, is the creation of an intermediate Court of appeals. This plan involves an amendment to the Constitution. At the last session of the Legislature, I prepared a joint resolution for the amendment of Section 1, Article VI, so that it should read as follows:

SECTION 1. The judicial power is vested in one Supreme Court, in Appellate Courts, in Circuit Courts, in Probate Courts, and in Justices of the Peace, etc.

In connection with such proposed amendment, I also drafted a bill to divide the State into judicial districts, to create Appellate Courts therein and to confer upon Circuit Judges sitting together certain appellate jurisdiction. The proposed constitutional amendment was broad enough to cover the creation of an entirely new court, but I did not deem it advisable to attempt the passage of a law for that purpose at present. The bill introduced would commend itself to the people and aid in the passage of the constitutional amendment in that it did not involve additional expense. It provided for the dividing of the State into nine judicial districts, in which the several Circuit Judges should sit together as an Appellate Court, without other compensation than their present salaries. This Court was to be given exclusive jurisdiction to hear and determine appeals from the various Circuit Courts in all civil cases, whether of law or equity, where the amount in dispute, exclusive of costs, did not exceed the sum or value of five hundred dollars, except in those cases involving a construction of the Constitution of the United States, an act of Congress, the Constitution of this State, or the personal liberty of the appellant. This bill was introduced in both houses; was printed, and copies of it sent to all of the Circuit Judges and to many members of the Bar in this State. There was considerable diversity of opinion developed among the Judges as to this bill. Some of them believed that it would add greatly to the labor of the Circuit Judges and were, on that account, opposed to it. Others, on the contrary, believed it would reduce their labor in the end, and on that account favored it. The discussion of the question developed a strong feeling against the creation of an additional court, for the reason that in order to preserve its judgments and opinions it would be necessary to print an additional set of reports and thus add to the already burdensome accumulation of books. What the result might have been if there had been any one in the legislature who was able and willing to give the subject proper attention, it is impossible to say. It is sufficient to know that the matter was wholly neglected by those who had it in charge, until it became too late to pass the resolution to submit the amendment in time for the spring election, and the whole thing was suffered to go by default. I am still of the opinion that the most practical and substantial relief for the Supreme Court is to be found in the erection of some sort of an intermediate court. Whether the people can be induced to vote for an amendment of the Constitution, which will allow the establishment of such a Court is, at least, doubtful. If not, then, in my opinion :

3. The next most feasible plan for the relief of the Court is by the election of additional Judges, who can be provided for at any time without a constitutional amendment. There ought really to be four Judges added to the Court. If that were done, the Court could sit in sections for the hearing of all except the more important cases. Or, if not sitting in sections, four of the Judges could, during most of the time, be at work at Chambers, examining the records of cases in which they were to sit, or preparing opinions in those cases in which argument had been heard. Such an arrangement would enable the Court, without serious difficulty, to remain in session most of the time, and would enable it, for the present at least, and perhaps for some time to come, to keep abreast of the business.

4. It has been suggested, as a measure of relief to the Court, that oral arguments be dispensed with, except where the Court should specially call for argument. While this plan would relieve the Court somewhat, and would give them much more

time for the preparation of their opinions, my judgment is decidedly against the advisability of establishing any such rule. My experience during the short time I was on the Bench, was that the Court gained much more from the oral argument of cases than from the examination of briefs. Owing to the great pressure of business upon the Court, and to the fact that the Judges are overworked, the danger is that none of the Judges, except the one to whom the case is assigned to write the opinion, will give to a case submitted on briefs the careful scrutiny and investigation that is necessary to arrive at a safe judgment. The fact of the matter is, it is a physical impossibility for the Judges to read all the records and briefs in all cases. No man could accomplish such a task and do it well if he had no other work, and when you add to such labor that of sitting week after week for the hearing of arguments, the practical difficulties become much greater. The only feasible plan, in my judgment, is one which will either,

- (1). Relieve the Court of the number of cases, or
- (2). Increase the number of Judges who are to do the work.

PRESIDENT: At my request, Mr. L. N. Keating, of Muskegon, has prepared some suggestions on this topic, and I will now ask him to give them to us.

Mr. President and Members of the State Bar Association:—A few days ago I received a communication from your president inviting me to prepare something in relation to the overcrowded condition of our Supreme Court. It struck me at first that if they were overcrowded, why didn't the Judges move their chairs and get more room instead of asking me to explain it in this hot weather; so I then declined to respond to this polite message of the President. I had no cases pending in the Supreme Court and I did not care to fire into the Judges this time of year when we were having at Muskegon nice picnics on the banks of the great unsalted sea of Lake Michigan. If the Judges of the Supreme Court are overcrowded, they certainly make it easy for one-half the attorneys when they are supposed to have decided a case and the other half who are on the cold side of the decision, do not care how much these Judges are crowded. They are engaged in dodging their clients whom they had so earnestly assured that the Supreme Court would be with them instead of on them.

Who knows the cause of this overcrowding? Some think the Judges write long legal essays instead of making short decisions; others say that the Supreme Court is one of last resort, it is between there and death, and the Judges wish you hadn't come and when you get through you wish so too. If the trouble is in having too many laws the fault is in the Legislature, if it is in the practice, the fault is in the Supreme Court. See Sec. 5, Art. VI, of the State Constitution, which gives the Court full power to change the practice as it pleases. Attorneys well know that the practice in Michigan is old-fashioned, out of date, full of red tape and rubbish. The Supreme Court could get out a new set of rules regulating the practice and save themselves a great deal of work and the attorneys also. All of the old-fashioned notices, pleadings, motions, long chancery bills, answers, demurrers and replications, can be swept out of existence and the records in the Supreme Court shortened by so doing.

What is the good of a replication? It is a legal conundrum. When a suit is commenced it should go right along until it is concluded, with all this rubbish cut out of it. From the number of candidates for the office of Supreme Judge, and the sleek, well fed, contented look of those who are successful, and wear the judicial ermine, these Judges do not seem to have a John L. Sullivan time of it after all. They do not have to go through the refrigerator sweat that many a poor attorney has who stands up before them to explain a few points of law while he is wondering if they decided his case before they filed out into the court room, and that they

are only listening to him because the State hires them to do so. We all admire short decisions. Where they say that the judgment must be affirmed or reversed with costs, is where we and our clients applaud from the back galleries if the costs are in our favor. Those words "with costs," are very funny; they contain the true Attic salt. This State Constitution of ours is too small for us; it does not begin to cover this great State, and it was never intended to by its makers. It is a small coat on a big man and covered with many patches. When they pull it on in Lake Superior country and try to make it cover up there, it leaves Southern Michigan uncovered. With its limitations and regulations it is a first-class constitution for a huckleberry county.

There was an attorney in Central Michigan who claimed to have made a study of this Constitution and they sent him to the Legislature but he never got any further for he knew too much of the State constitution. The farmers in the Legislature threw him overboard; they thought he was an attorney for the dressed beef combination and you know that an attorney for that combination can't even be chairman of a political committee without having mean things said about him. Now this blessed old aunty of a State Constitution of ours contains a section, Section 25, Article VI, which provides that the Legislature may establish Courts of Conciliation with such powers and duties as shall be prescribed by law. They had such courts as these in the reigns of Edward I, and Edward II, to which, says Coke on Littleton, p. 304, were referred cases of considerable difficulty. They ought to have such a court of conciliation in Pennsylvania at the present time.

Why not have Courts of Conciliation established in Michigan under this clause of the State Constitution? Make them broad and liberal enough to cover a large class of difficult cases, that now take the time of the Supreme Judges. Cases of accounting, of arbitration, of settlement of estates, of winding up of corporations, and to cover the broad definition of cases of considerable difficulty. I would go further in establishing these Courts of Conciliation, in this, that it appears to me that we are drifting in the direction where organized labor and capital are standing glaring at each other with drawn pistols at each other's heads. I would create these Courts of Conciliation with such powers that the Judges of the same could summon organized labor and organized capital into the court room and inquire into the contention, making a decision that would do justice to the rights of both. Organized capital cannot close its books and refuse to show its profits and demand a reduction of wages of organized labor. Nor can the walking delegate order out labor on a causeless strike. If such Courts of Conciliation were established with full powers in this State, and it seems to me the time has come to establish them, our Supreme Court would find relief.

PRESIDENT: Are there any others who have made special preparation? If there are, we shall be very glad to hear from them; but if there are not, it would be very agreeable, I think, that there should be a discussion by those who are not specially prepared except by their experience. I will call upon Judge Champlin to speak upon this subject.

JUDGE CHAMPLIN: *Gentlemen:*—Before proceeding to make any remarks on this subject, I wish to state that I think there are some Circuit Judges present, and I move that they be invited to take part in the proceedings and to take seats in this portion of the room. The Supreme Court Judges ought also to take part in the deliberations.

The President invited the members of the Supreme Court and judges of the Circuit Courts to take part in the discussion.

JUDGE CHAMPLIN: *Mr. President, and Gentlemen:*—The subject under discussion is one of considerable difficulty. I have had some experience, and I do not

wish to approach the subject from the standpoint of a lawyer. The Constitution provides for courts of conciliation, but they have never met with any great success since the reign of Edward I, for the very reason that the machinery by which they are organized is not sufficient to carry out the decree of the Court. In this respect they resemble, in more respects than one, the Court which is provided for and known as the Inter-State Commerce Commission. Undoubtedly such a Court could afford some relief to litigants, but the character of the litigation before the Court would be about of the same character as that now determined before Justices of the Peace, and for the purpose of the settlement of small amounts between citizens in the neighborhood, those Courts appear to be ample. They are provided with a jury who may hear and decide from the facts, and if a party is not satisfied with the decision of that jury they may take an appeal to the Circuit Court of his county, and he may have a second jury summoned from the county, who may decide upon the facts. But it seems that it is human nature not to be satisfied with the decision of two juries, and of a Justice of the Peace and a Circuit Judge, but they want to try to find out what the Supreme Court will say upon the subject, and consequently a great many cases are carried to the Supreme Court, which take up the time of the Court and a decision must be made, and this imposes labor upon the members of the Court. One of the schemes which have been advanced is to cut off this right of appeal to the Supreme Court, after giving the parties the right to two trials among his own neighbors. Unless there is some important question of law, it would seem that human nature ought to be satisfied, upon a question of facts, with the decision of eighteen men upon the facts involved in these cases. I think a scheme might be framed where, in case of a serious error as to the law as applied by the Circuit Judge, the difficulty might be overcome by submitting an abstract of the law question to a Judge of the Supreme Court, and if he was satisfied that there was a palpable error he might approve a removal of the cause to the Supreme Court, and in that manner a good deal of useless litigation and of labor would be prevented in the Supreme Court.

Of course questions involving personal liberty and questions involving constitutional rights and principles, and they may arise upon a question involving a very insignificant amount in litigation, should not be limited to a trial by the Circuit Courts, but should be passed upon by the Court of last resort. Therefore, I would allow in a scheme of this kind appeals to the Circuit Court in cases involving personal liberty or constitutional questions, no matter what amount was involved, but in all others it seems to me that cases involving a certain amount, say from five hundred to one thousand dollars, should be restricted to the two courts I have named. With this as a remedy, at least one-third, in my opinion, of the duties and labor of the Supreme Court would be curtailed. I do not think that over three-fourths of the cases, outside of the equity cases that are carried to the Supreme Court involve more than five hundred dollars. The fact is, it gets to be a question in a good many cases of who shall pay the costs. If they can get it reversed and get the costs upon the other party they are satisfied, and that is the inducement to carry the case to the Supreme Court.

Another method has occurred to me which it would be advisable to incorporate into the statutes with reference to the writ of error. No party should be allowed to carry a case to the Supreme Court for an error of law until he has first made a motion for a new trial in the Circuit Court, alledging the errors of law charged, and the motion should be brought on to be heard before the Circuit Judge and this gives him an opportunity to correct any errors he may be satisfied he has made in trying the case, by giving a new trial before the case is taken to the Supreme Court, and when the case is taken to the Supreme Court, only such errors as are alledged in the court below should be raised upon the assignment of error in the Supreme Court. That would cut off a large percentage of the cases which come to the Supreme Court. It is quite natural enough for a lawyer when he knows he has a good point

of law against the Circuit Judge, who, in the progress of a trial is forced to consider these questions as they arise, and decide them according to his first impression, and who may commit an error, which, upon reflection he would correct by ordering a new trial—I say it is natural for a lawyer if he wants to take an advantage, to take the case to the Supreme Court, and after he gets there he gets just what he would have got before the Circuit Judge if he had moved for a new trial. That, as I understand it, is the plan adopted in the State of Wisconsin. They make a motion for a new trial and set forth the ground and the errors of law, and after argument upon that, they can only go to the Supreme Court for the errors of law made by the Circuit Judge. That would curtail the cases going to the Supreme Court, I should judge, at least from twelve to twenty per cent.

There is a difficulty in curtailing the cases according to the amount involved, which may be taken to the Supreme Court, because every one has an opinion that he has as good a right to contest a small amount and have it passed upon by the Court of last resort as one involving a larger amount. Theoretically, that may be true, but as a matter of policy and expediency, and as a matter of justice, it is not right. There must be an end to litigation somewhere, and if our scheme in this State only contemplated a trial and a result in the Circuit Court that would be the last of it. The Court of last resort is intended only to correct the errors of law of the Circuit Court, and it may be well for us to say in which cases those errors shall be corrected.

It has been stated, in the President's address, that a large amount of business of the Supreme Court consists of cases of mandamus. That is true, but it is not the fault of the Constitution, it is not the fault of the law, but the fault of the Court. The writ of mandamus has got to be such a favorite remedy that almost every case is brought to the Supreme Court on mandamus to get a guess from the Court that may show what the future result will be. If we could enforce the principles of the Common Law, because every man had a right to a jury-trial upon these questions of fact, it would diminish these motions from sixty to seventy per cent. It is the fault of the Court that has been growing and increasing, and they think it is an easy way to get rid of it, but they had better stick to the Common Law rule, that the writ of mandamus does not lie unless there is no other legal and adequate remedy. So I have no sympathy with that plea, and if they want to make work for themselves they can perform it.

I have said thus much upon the right of limiting the appeal. I do not know, and I am not satisfied with the advisability of establishing an intermediate court, because there would be an appeal from that to the Supreme Court. If you can cut off the right of appeal you had better do it without the intermediate court. The history of that court in New York is that the cases are not kept from the Supreme Court because there is an intermediate court, and I do not think that would relieve the Supreme Court unless the right of appeal was cut off in certain classes of cases, and ended at that court, and if that is done then it is a court of final resort.

As to the other question, of an increase of the number of judges, I will say that unless you can curtail the number of appeals taken to the Supreme Court there must be an increase of the number of Judges, but when you increase them to nine, with the avowed object of allowing four of them to work in their room writing opinions, you argue the question before five, and you don't have the Supreme Court decide upon the cases you have, you have five-ninths of it. Of course all constitutional questions would have to be argued before a full Bench. That would theoretically relieve the Court to a considerable extent and would, I think, be productive of better opinion, for the reason that before they came together to the argument, and before the opinions were written, they would have a thorough understanding of the record and of the whole of it. Any system which you may devise which does not give to each of the Justices an opportunity to examine the whole record, will not attain that excellency in decision nor that certainty in result in favor of justice that is desira-

ble and would be accomplished if the whole number of the Judges could be acquainted with the record upon which they pronounce their decision.

I may say that since the paper which I read before the Bar Association of Detroit was delivered, there has been a marked improvement with respect to the method of doing business in the Supreme Court, and with respect to the amount of time and attention that is bestowed upon each individual case, which was not possible under the former practice of the Court. Since that time the state has seen fit to allow the use of stenographers to the Supreme Judges. This enables each Judge when he has written an opinion to send it to his associates. That associate having listened to the argument reads that opinion and he is able then to detect whether or not it conforms to his idea of what the decision ought to be. Since that time you have had better considered opinions and the cases have been more satisfactorily decided. I can, speaking from experience, say that it is more satisfactory to the Judges; the cases have received better attention. It has been of substantial relief to the Supreme Court and it has redounded to the credit of their decision, but that does not help them to keep up with the business before it and never will unless you give a greater number of Judges the opportunity to dispose of them.

Which is the wisest course? Which is the most inexpensive? I say the wisest and the most inexpensive is to limit the amount involved in which cases may be taken to the Supreme Court. But if the good people of the state will not consent to that, and insist that if they have a cow killed by being run over by a locomotive that they shall have the right to carry that to the Supreme Court, and that cases involving five or ten dollars must be sent there, you must have more Judges to do that work, and a sufficient number to accomplish the work in the manner in which it ought to be done by a Court of last resort.

PRESIDENT: I am very glad of one suggestion made by Judge Champlin, and that was the recommendation that in all cases before a writ of error could go from the Supreme Court, the trial court should have an opportunity to reverse or correct its own ruling; that no errors should be assigned except those covered by the motion for new trial, and that error might be assigned upon the refusal of the court to grant the motion. I remember it is only about three years ago that I prepared a bill substantially in those words with a view to its being passed in the legislature. The members of the Judiciary Committee of the House thought it the proper thing to consult the judges of the Supreme Court before recommending it, and my understanding is that the judges of the Supreme court were almost unanimous in opposing the passage of the law. I am glad that the reform is progressing. I think I might call as a witness in this case Judge Pealer.

JUDGE CAHILL: Would it not be competent for the Supreme Court, by a rule, to establish the practice that Judge Champlin has suggested, and I agree fully with the suggestions he has made? I can see it would accomplish an additional purpose. Since the passage of the law which does not require counsel to submit a brief of the testimony to the Court it has become absolutely necessary to take the entire testimony taken on the trial. If a motion for a new trial had to be made, and all errors assigned and the Supreme Court could find such errors as were there alleged, bills of exception could be reduced one-third of the length they usually now are and save a great deal of labor of the Supreme Court.

John C. Patterson, of Marshall, then addressed the Association.

Mr. PATTERSON: Society must govern or protect the rights of its members and enforce their rights either by a standing army or by a standing court, and when a

member of society discharges the duties of a citizen it is expected that society will protect him in his rights and redress his wrongs. Society will only do this properly by a standing army or by a standing court, and the policy of our State and the policy of our Nation is to protect these rights by the Court. It seems to me it is a duty society owes to its members to provide ample courts to enforce his rights and redress his wrongs. Though he may be an humble individual, though a small amount may be involved, society cannot draw the line between the humble litigant and the wealthy litigant; between the rich man and the poor man. What, though in one case it may be the poor man's cow, and in another the rich man's railroad stock, and yet the cow may be of more relative value to the poor man than is the stock to the rich man. So I think in our efforts to relieve the Court we should bear in mind what the duty of society is to every individual, and we should attempt to provide courts in the future to redress all his wrongs and protect all his rights. If the courts under the present system do not offer sufficient facilities to do this work it is the duty of society to provide them, and if the present number of Judges is not sufficient then we should increase the number.

With reference to the writ of mandamus, it has been suggested that that remedy should be cut off or restricted in its use to certain cases. That is a very cheap procedure. It is a very prompt procedure; it is a very desirable one. In a certain class of cases the parties might be required to push their cases through to a final determination in a court of law or equity before asking the Court of last resort to decide these points, but if a motion can be brought up—the motion for mandamus—many times it would dispose of the case in the lower court. Then again, if you did not grant the remedy under the writ as we do now under our present practice, undoubtedly it would get there on appeal or writ of error eventually, so I doubt about our saving a great deal of labor for the Court in cutting off jurisdiction under that procedure. It seems to me we should make provision to dispose of all cases, and if the present corps of Judges is not sufficient it is the duty of society to provide enough to do it.

Calls were then made by various members of the Association for Judge Grant, and he responded as follows:

JUDGE GRANT: It is worth a ride from Detroit here, Mr. President, on the hottest day of the season to hear my brother Champlin make his speech upon the needed reforms of the Supreme Court. I am sorry he didn't reform before he got off the Bench, and I am glad he reformed after he got off because it will help us who are there. There is a good deal of force in what my good brother says about the abuse of the writ of mandamus, but my good friend has been there since he left us with some very important questions, and questions that might have been raised by writ of error eventually instead of by mandamus as they were. I presume he thought we would still keep on in the good old way—or bad way. There are questions which can be reached by writ of error which do come to our Court by writ of mandamus, and I conceive that it is for the good of the people that those cases do come there. It has been the rule of the Supreme Court, I think long before I was there, and long before my brother Champlin was there, that in those cases involving important public questions, they should be decided promptly and save the people a good deal of trouble. So far as that branch of the question is concerned we do not deserve any sympathy at your hands.

I suppose this is a meeting for a free expression of opinion, no matter who we hit or what they think of it. My brother has referred to the necessity of the Judges reading the record. Now there is another illustration of the fact that we cannot do it, because to my certain knowledge within six months the Chief Justice looked down upon an attorney arguing a case and said: "We have examined the record and there is such and such points in the case and we will hear from the other side," and I afterwards heard that the party said he did not thank the Supreme Court for granting his writ before he had the right to be heard. There are some things the Court can do. I

suppose the Court can in its authority limit the time of argument. I suppose it is in the power of the Court to say that all cases must be submitted upon briefs unless an oral argument is ordered by the Court. That has been discussed. The general consensus of opinion, I take it is against that, but I think I am appealing to the good sense of every man here, when I say you may take the records of the Supreme Court for twenty-five years and you can find case after case there decided that never will be referred to, and never is referred to in court. The principle has been decided over and over again, or it involves a simple question of facts about which the parties interested are the only ones concerned, and yet in every case, whether it has been decided frequently by the Court or not, the Court is ordered by the Constitution to write up a statement of facts in the case, apply the law to it and have that published in the reports. Whatever use that may have been in the Constitution in 1850, when it is shown by my friend, Justice Cahill, as it has been shown here, that the Court had little to do, but to accept the professorships and like law books. It has certainly lost its use at the present time and I think it should be submitted to the people of the State in the next spring election, in order to allow them to wipe that out of the Constitution, and leave it to the Judges to say in what cases opinions shall be written for publication. Do they say the Court cannot be trusted in this matter? Then let me say to you that you can go back to the records which will show that not a single term of Court has passed in which it is not shown that opinions have been written in mandamus cases and in the matter of motions where the Court was not obliged to write an opinion at all.

I think my brother Champlin has hit the nail right on the head when he suggests relief by a limitation of appeals, and that is where I hope the Association will land itself. As my friend says, if a man has had his case passed on by eighteen men and two judges, the presumption is pretty strongly, from what I know of the character of the Supreme Justices of this State, that they will decide that he has had his case rightly decided. I do not see any reason why the case should be taken to the Supreme Court. Last term we had two cases, one involving five dollars, and the other two dollars and a-half, and there was more feeling in both of them than anything else, and yet they took those cases to the Supreme Court and required five grave Justices to occupy time in deciding upon such questions as that. If you say the poor man has the same right as others to be heard, I will agree with you, and say he has the same right and enjoys the same right, and you will find that the rich man or corporation is as often cut off as the poor one. So I think that is what ought to be done, to limit the right of appeal, with this proviso, which protects the rights of everybody, that when you have a Supreme Court you cannot trust you had better increase it. If the question is a constitutional one of course it should go up. If it involves the validity of a statute which has never been passed upon by the courts, that should go up. In other cases there should be the right to present a case to the Supreme Court, because I can see there may be cases where injustice ought to be righted although the amount is small, leaving the right to the party to present his case to the Supreme Court and to ask leave to appeal, in the same way that he asks for a writ of mandamus. I think this should be the right of all. But the people must do whatever they choose. The court is in this position. They are behind, and they will not go faster than they can and do the business comparatively well.

In regard to the method pursued in Wisconsin, which was referred to in Mr. Russell's letter, I think you could accomplish much in eliminating unnecessary parts from the record. To illustrate, there was a case at the preceding term of our Court in which there was a record of some seven or eight hundred pages. The lawyers both conceded upon the trial that from fifty to one hundred pages would have been all that was necessary in order to submit the case; but they could not agree, so they took the minutes of a stenographer and had them certified up. The Wisconsin method of eliminating unnecessary parts of the record is very good. The minutes are sent up, the appealing party makes up a statement of facts that he thinks are involved in the case, and if the

other party is not satisfied with those facts he states the facts as he believes them to be, and then we have the briefs. That saves a large amount of printing and saves expense to litigants as well.

Judge Montgomery was then asked to speak upon the subject.

JUDGE MONTGOMERY: I did not expect to take part in this discussion. Some suggestions have been made that meet with my hearty approval. This is a question which, of course, concerns the Bar and the people of the State much more than it does the Court, for it is in the interests of the administration of justice, which should be always speedily administered, and when the time comes that the determination of a lawsuit cannot be anticipated or foretold as to the time, it very often amounts to a denial of justice. As to the suggestion made of limiting the right of appeal to cases involving a certain amount being in the nature of class legislation, it seems to me when we consider the facts suggested by Ex-Judge Champlin, and others, that in a large majority of cases a man has a right, under the laws of the State, to two trials by jury of every question of fact, and to a ruling of two different persons sitting as judges—the Justice and the Circuit Judge—it is not likely that justice will miscarry in a great number of that class of cases. And so far from its amounting to an oppression to the poor man who comes into court with a small claim, the very fact that an appeal is open to a monied corporation often times works the very oppression which is sought to be guarded against. It is no great favor or privilege to a party to appeal a case to the Supreme Court where the amount involved is so trivial that the cost of appeal would exceed the whole amount in controversy. It does that man no good to obtain a reversal of his case. On the contrary, if he is litigating with some corporation that can, by appeals and delays, terrorize others bringing suits against them, it often happens that it can be made an offending weapon and of real injury in these trivial cases.

This crowded condition of the Supreme Court exists. It is not material to the discussions here by what method or practice it exists, or under what system of practice this work has been put upon the Court. Sympathy has been denied to the Court upon some hands because of the manner of practice which prevails there, which was found on the 1st of January, 1892. The right of mandamus had been extended to take in a large class of cases which were formerly not sought to be within the jurisdiction of the Court under that writ, but the Court has, in its judgment, seen fit to extend the rule and to allow the writ of mandamus in a large class of cases which were not formerly triable by that writ. This is not alone true of Michigan; it is true of the Courts of last resort of many other States, and has been said by as able a writer as Mr. Justice Dillon, to have been the practice for some years. But I anticipate that whether this was so or not the same question would, in some form or another, find its way to the same Court to be passed upon by some other process. But the difficulty does exist. It is admittedly the fact that the Court is not able to give the attention of each individual member of the Court to each individual case that the litigant who takes his case to be passed upon by the highest appellate court of the State is entitled to have it given. In that situation, it seems to me that the action of this Association upon this question is timely, essential and necessary, and that either by one of the two methods suggested—by limiting the appeal to cases involving a certain given amount, or by increasing the number of Judges—this remedy will have to be worked out. I share in the fears of my friend, Judge Cahill, that the Legislature will not be found willing to establish an additional court, and that the people will not be found willing to authorize legislation without limit as to the expense to create additional courts, with all the expense which would be supposed to follow in its wake. I fear also that the mistaken notion as to the sacred rights of the poor litigant, would work out a like result of an effort on the part of this Association to induce the Legislature to enact a law limiting the amount to entitle a litigant to an appeal. If that should prove to be true, then it seems to me the next most effective measure to be resorted to is to add to the number of Justices of the Supreme Court; possibly extending the idea of Justice McGrath a step farther, and

permitting the Court to sit in two sections. If the Court is composed of nine Judges, permit four to constitute a quorum, so that cases may be assigned to the two sections, and permit the two sections of the Court to be working at the same time.

MR. N. A. FLETCHER, of Grand Rapids: I move that the Committee on Judicial Reform prepare a report as to the best means of relieving the Supreme Court, and that they present it to the Governor at the next session of the Legislature and to the Legislature also.

Dallas Boudeman, of Kalamazoo, spoke upon this motion, as follows:

MR. BOUDEMAN: It has been my pride, as one of the members of this Bar, that in conversation with attorneys in other States, outside the limits of this State, to say to them that one of the strong things of Michigan, as far as her law business is concerned, was that she was up. It has been a boast, I think, of the Bar generally of the State, that our Supreme Court has always had their business up and finished. We all know, however, that it has been with the greatest pressure that it has been so disposed of, and we all see now that it is absolutely impossible that the Court can longer do it. The figures produced here to-day by Judge Cahill must show to us all that it is impossible. We must not lose sight of this one thing in the discussion of this subject, that Michigan is but in its swaddling clothes as a State; with all its immense business, with its immense resources, and with all its immense institutions, it will stand in twenty-five years from to-day, probably, double in nearly everything that goes to make a great State. It is absolutely impossible for it to be otherwise, and so in whatever scheme we present to the Legislature of this State we should have not only regard for to-day alone but for the years to come. I believe we should do the same as has been suggested: In the first place, limit the right of appeal to three hundred dollars. I believe in addition to that we should add to the Supreme Judges four more members, making it a Court of nine, and allow that Court to sit in double session, providing that five shall constitute a quorum. It is shown here, very satisfactorily to my mind, that if you limit appeals to three hundred dollars you will still have two-thirds to three-fourths of the business yet on your hands to be disposed of by the Supreme Court. You would still have all that Court could take care of to-day, and more than they should be called upon to take care of, because that Court should never be called upon to sit for a single minute in the month of July or August, nor should this Association be called upon to convene again during those months. [Applause.] If that is practical, why should we not still go out from the State of Michigan and say we are up, and our Courts have finished their business..

One of the greatest things we have to contend with in our profession is the continual complaint made by our clients of the delays of litigation, and the moment you get behind with your business in your Court, whether it is a Circuit or Supreme Court, these complaints come in thick and fast and they have ground for it. If we go before the Legislature with that idea, that it is the duty of the State to see that the people have the right to demand that this thing shall be remedied so that legal business shall stand on a par with all other business, we shall have an argument that nobody can overcome, and I believe, if the matter is properly presented, that both suggestions will be carried out. It has been suggested that if you get nine judges only five of them will act, and you don't get the opinion of the Supreme Court, but yet we only have five now. We will still have five selected from the Bar of the State, and undoubtedly all good lawyers, to decide these cases, and it seems to me we can arrange it to have a quorum of the Court to act for the Court in all these cases, and thus relieve the others, for the time being, from sitting in the Court and listening to the arguments.

It seems to me another thing ought to be done by the Supreme Court itself. I think the Court ought to limit the time of argument in the smaller cases. I think if a case involves no more than six hundred dollars the argument ought to be limited.

I know I have discussed cases of no great importance at considerable length, and when I had finished, I felt guilty of having consumed so much time. A limitation of time is also an education of the lawyer. If the Court says you have a half an hour to present your points in this case, which involves but a thousand dollars, and you conform yourself to the suggestion, you will be a better lawyer by doing it. It gives the lawyer a faculty of condensation which is invaluable. That is a suggestion I throw out to the Supreme Court itself, to shorten up the time, thereby lessening long arguments which in many instances must be very uninteresting to the Court.

Regarding the motion before the house, I will say that I think the motion is all right, but at the same time it seems to me that this Association ought to put in writing and present to-day certain things which it deems practicable to submit to the Legislature, so that this Committee, whoever they may be, will have the judgment and advice of this Association before it for consideration.

W. H. H. Russell, of Detroit, then addressed the Association.

MR. RUSSELL: I desire to second the motion and will urge briefly the fact that there are two papers assigned to be read this afternoon and other business to be accomplished. The committee that will be appointed can have the benefit of all this discussion, and after full consideration could report in time for a submission of the matter to the next Legislature.

The remark of Mr. Justice Champlin strikes home to every practitioner in this State. If every conscientious Judge of the *visi prius* courts who sits on trial of a case, would entertain a motion for a new trial, and on the motion for new trial the errors of law were specifically set out in the motion, and the law day was fixed, and the argument heard the trial Judge could correct the errors of law on the trial of the cause, and every conscientious lawyer would advise his client: Now you have had a trial by jury, the Judge has reviewed the law and I advise you to be content with a trial of your case instead of going to the Court of Appeals. I believe that if motions for new trials in this State were made and argued before the Circuit Judges on law days, it would cut off appeals in twenty per cent. of the cases that go to the Supreme Court. One of the greatest benefits and objects of this Association is to elicit the very discussion we have had here to-day, and also to have the reflection, experience and opinion of the Supreme Judges upon the Bench which we could get in no other manner, than as we get it in the meeting of the Bar Association. One of the greatest achievements of the American Bar Association resulted in the discussions that have been had since 1880 up to the last two years, and that resulted in the relief of the Supreme Court of the United States. Their labors were finally accomplished by the creation of the intermediate appellate courts.

Whether we can restrict and limit appeals is a question for the Legislature, but this committee which the President has the power to appoint can formulate such a system as can be submitted. I hope Mr. President, that the motion of the gentleman will pass, and that the members of the committee, if appointed from representatives who are here to-day, will recognize the significance and importance of immediate action, so that relief may be given to the Supreme Court.

There was one other feature in the President's address that I wish to refer to and that was as to admissions to the bar in this State. I know for a fact that a man was admitted to the Bar in the City of Detroit who had been accused of murder; was charged as a horse thief and also with burglary, and yet, under the present system of admission in this State, that man was admitted to the Bar and was subsequently disbarred in the City of Detroit for improper practices. I support the motion.

PRESIDENT: The motion of Mr. Fletcher is that the subject matter of relief for the Supreme Court be referred to the standing committee on Jurisprudence. The motion being put, prevailed.

JUDGE CHAMPLIN: I move that the rest of the President's address be referred to the appropriate committees for report. The motion being put, was carried.

PRESIDENT: I believe the next order of business is the report of the Secretary and Treasurer. Neither of those gentlemen are present, but both have sent reports.

The Secretary's report, in the absence of Secretary D. F. Glidden, was read by the temporary secretary, Ralph Stone, and adopted. It showed an enrollment of 263 members, and recommended an increase of the dues. The report of the Treasurer, H. M. Campbell, was read and adopted. It is as follows:

RECEIPTS.

June 16, 1891.	Balance as per Treasurer's report for previous year.....	\$ 29.54
" " "	Banquet dues, back dues and exchange.....	257.25
	Dues from members during year.....	143.00

DISBURSEMENTS.

June 17, 1891.	Van Est and Graves, banquet	\$345.00
July 1, "	Speaker Printing Co., printing.....	5.75
Nov. 17, "	Wm. Graham Printing Co., printing.....	9.50
Jan. 4, 1892.	" " " " " ".....	1.25
Jan. 28, "	H. Whittaker, stenographer, copy of minutes, ...	20.00
	Balance cash on hand	48.20

\$429.79 \$429.79

It was suggested that experience had proven that the present membership fee of one dollar per year was inadequate to meet the necessary expenditures of the Association. Upon motion of Mr. Taylor, of Grand Rapids, the Association voted to raise the dues to two dollars per year.

JUDGE CHAMPLIN: I move that the rules of the Association be suspended and that we proceed to the election of officers for the ensuing year *viva voce*. The motion being put, prevailed.

The following officers were elected, the constitution being amended upon motion of Judge Champlin, so that the offices of Recording and Corresponding Secretary were combined:

PRESIDENT—Edward Cahill, Lansing.

VICE-PRESIDENTS—1st District, Alfred Russell, Detroit; 2d District, C. R. Whitman, Ann Arbor; 3d District, Dallas Boudeman, Kalamazoo; 4th District, L. C. Fyfe; 5th District, E. F. Uhl, Grand Rapids; 6th District, George H. Durand, Flint; 7th District, T. M. Crocker, Mount Clemens; 8th District, Chas. S. Draper, Saginaw; 9th District, Michael Brown, Big Rapids; 10th District, T. A. E. Weadock, Saginaw; 11th District, T. L. Chadbourn, Marquette.

SECRETARY—Ralph Stone, Grand Rapids.

TREASURER—E. D. Barry, Grand Rapids.

BOARD OF DIRECTORS—Levi T. Griffin, W. H. H. Russell, H. M. Campbell, Hoyt Post, Detroit; T. A. E. Weadock, Saginaw; I. O. Grosvenor, Monroe; G. P. Wanty, Grand Rapids; D. F. Glidden, H. T. Thurber, Detroit.

GENERAL COUNCIL—1st District, Michael Brennan, Detroit; 2d District, John F. Lawrence, Ann Arbor; 3d District, T. A. Wilson, Jackson; 4th District, R. R. Pealer, Three Rivers; 5th District, F. A. Maynard, Grand Rapids; 6th District, R. A. Mont-

gomery Lansing; 7th District, A. R. Avery, Port Huron; 8th District, Robert McKnight, Saginaw; 9th District, F. A. Nima, Muskegon; 10th District, C. L. Collins, Bay City; 11th District, D. H. Ball, Marquette.

LOCAL COUNCIL—1st District, W. H. Wells, Detroit; 2d District, A. J. Sawyer, Ann Arbor; 3d District, F. A. Hooker, Charlotte; 4th District, H. P. Stewart, Centreville; 5th District, A. A. Ellis, Ionia; 6th District, R. C. Ostrander, Lansing; 7th District, J. B. Eldred, Mt. Clemens; 8th District, J. E. Nolan, Saginaw; 9th District, William Carpenter, Muskegon; 10th District, James VanKleeck, Bay City; 11th District, G. W. Haydon, Marquette.

Motion made by Judge Champlin that when the Association adjourn, it adjourn to meet in Lansing the third Tuesday in January. Carried.

PRESIDENT: During the last year, as you all know, there has been undertaken the publication of a law journal. The editors of that journal are now living in Grand Rapids, Messrs Stone and Jewell, and they desire that the journal be made the official journal of this Association. As I understand it they will publish the proceedings of the Association without cost to the Association beyond the preparation of the matter, the copying of the minutes of the stenographer, etc. Judge Champlin, as I understand it, has some resolution on the subject.

JUDGE CHAMPLIN: I have a resolution which was based upon a letter received from Mr. Stone, stating in effect that they would be glad to publish the proceedings of the meeting if they were not too lengthy, and would do so in connection with the minutes of this meeting, if the minutes were furnished them by the stenographer without extra cost. Am I right about that?

MR. STONE: Yes, sir.

JUDGE CHAMPLIN: They wish the encouragement of the Bar Association in their work and they are prepared to publish the proceedings of this Association. I have with me here a resolution which I submit for the consideration of the Association in this connection. It reads as follows:

Resolved, That the Michigan State Bar Association adopt the MICHIGAN LAW JOURNAL as its official publication, and that hereafter the proceedings of the annual meeting be published therein as the official organ. And be it further

Resolved, That inasmuch as the publication of the proceedings' of the annual meeting in the MICHIGAN LAW JOURNAL will effect a saving of a considerable sum of money to this Association, the members of this Association are urged to support the MICHIGAN LAW JOURNAL by subscribing to it and by rendering it such financial support as they are able, and by contributing to its columns articles of general interest to the profession in the state.

I move the adoption of this resolution. The motion was carried, and the Association adjourned.

SECOND ANNUAL BANQUET.

In the evening the second annual dinner of the Association was given at the Morton House. The retiring President, T. J. O'Brien acted as toast-master. Judge Champlin responded briefly to the subject of "The Law."

W. H. H. Russell, of Detroit responded to the toast, "Forensic Eloquence" as follows:

MR. RUSSELL: When Thomas J. O'Brien was a student at the law department of the University of Michigan, in 1864, one of his principal characteristics was truth and candor. Since that time what he may have acquired in your immediate community makes it somewhat questionable, since he referred to the Ex-Chief Justice in the manner in which he did, and when he asked me to-day, to my surprise, to take the place of a gentleman who had been selected to respond to this significant sentiment, I felt somewhat like the Irish boy I heard about when I was a schoolmate with "Tom" in 1864. This Irish boy came over from the "Emerald Isle" with a schoolmate; they separated and did not meet for many years. Fortune finally threw them together and they fell to discussing the scenes and incidents of their boyhood days. One of them said to the other, "Pat, and are you ever going back to old Ireland again?" "I don't know, faith," said Mike, "If I live until I die, and God only knows whether I will or no, I intend to go back to old Ireland once more before I leave this country." [Laughter.] And so I feel that it is almost presumptuous for me to attempt a response, on so short a notice, to the sentiment, "Forensic Eloquence." And yet when I entered your magnificent court room this afternoon, in your new Temple of Justice, which should be the pride of this community and the State at large, as it is the finest I have ever yet seen in the State of Michigan, I felt that every member of the Bar there assembled, notwithstanding the heat, ought to feel that when a community like this takes that pride and honor in the profession of the law and the due administration of justice which will cause them to erect such a structure, with such elegant court rooms, that there is inspiration enough in the incident itself to make any man feel that he is proud of the profession which has characterized advancing civilization by its grand achievements in embellishing literature and forensic eloquence. I was reminded when I rode out on your splendid system of rapid transit, this evening—and allow me to congratulate you in having one of the best systems I have seen in the United States, from San Francisco to Boston—with the cars registering ninety-eight passengers, independent of those riding on transfers, I felt that if the City of Detroit, the Queen of the Straits, could have the same enterprise and spirit that we find here in the City of Grand Rapids, the State of Michigan, not only in its professional characteristics, but in its progressive elements, might feel proud in knowing that it was one of the greatest States of the American Union. [Applause.]

As we enter the domain of "Forensic Eloquence," and go back in classic history to the days of the great Lord Brougham, who, in one of his magnificent bursts of eloquence in Parliament upon the question of "Law Reform," seemed to symbolize and catch the soul and spirit of true eloquence in legislative administration, when he exclaimed, "It was the boast of Augustus, that he found Rome of brick and left it of marble; but how much nobler shall it be for this sovereign who can say he found law dear and left it cheap, found it the patrimony of the rich and left it the legacy of the poor; found it a sealed book, left it an open page and a living letter; found it the two edged sword of craft and oppression, left it the staff of honor and the shield of innocence."

When I came in on that car to-night, and saw the splendid crescent of the moon in the south, and that mystic symbol of all the planetary systems, Mars (which I think is the cause of this tremendous outburst of heat), I was carried back to the scenes and incidents of Roman history, when that grandest character of all ancient times stood forth in the magnitude of his greatness, Cicero, the greatest forensic orator of ancient times. I could see him as he stood forth in the forum battling for the people and humanity and for the Republic in which he had taken so much pride. And that when the forensic eloquence of Cicero and his compeers was heard no more, the Roman Republic declined from its former greatness, which had prevailed for nearly five hundred years. When we come to our own America, as an illustration of forensic elo-

quence, I may cite the instance of that splendid genius from Kentucky—and that great commonwealth has given to our Republic some of the brightest orators in the scintillations of human genius—Thomas Marshall, who was called upon to pronounce, in the City of Lexington, the eulogy upon young Menifee, a bright lawyer and member of Congress, who in early life was stricken with consumption. Marshall crystalized all the features of forensic eloquence when, summarizing all his virtues and his characteristics, in these brief and eloquent words, he said "He encountered hostility in his upward flight, when did soaring genius fail to do it, though meaner birds would have barred him in his pathway to the skies, with crimson beak and bloody talons he rent his way through the carrion crew and moved majestically upward to bathe his plumage in the sun." In our great Republic, from Boston to San Francisco, we have illustrations of some of the brightest, some of the best, some of the keenest scintillations of human genius this world has ever produced, and if the profession, and the judiciary of our profession at large, will not exclude from the forums of our temples of justice the forensic eloquence which ought to characterize every session of our Courts of Record, the time will come when the American Republic, with all its achievements, with all its advances in science and in progress, will stand foremost among all the nations of all the ages in the grandest achievements and realizations of forensic eloquence and oratory. There is a beauty and a grandeur in the American genius, as found in this Republic, in the independent and sovereign States, from the Atlantic to the Pacific when we remember the fact that all our institutions are founded upon that theory of government which gives all the honors possible in the achievements of man, which are possible and more especially so when we realize that a man can rise to the Chief Executive office of the Nation as a citizen, and that he is sovereign in that respect above all the kings and potentates of this earth.

It was my good fortune in 1871 to hear in the English parliament the great diplomat, Lord Beaconsfield (Disraeli), and the grand old man, Gladstone, in a debate upon the famous Phoenix Park Bill, and I thought while listening to their efforts, that of all the schools for oratory since the days of Demosthenes and of Cicero, this Republic of ours, composed of sovereign States, affords the brightest fields and examples of forensic genius that any country or any nation has ever given to the civilized world. And so if we teach the bright American youths the true theory and trend of our institutions, that we have a government of the people, by the people and for the people, and if we keep them upon that line of theory and practice in this country, every man that goes to our colleges, every boy that attends our public schools, will appreciate the fact that all honor and praise which it is possible for this country to bestow upon any one man, or that it is possible for our Nation to confer upon individual merit is open for his achievement. When Mr. Gladstone said in his speech, referring to the American Republic, that to America they might look for some of the brightest illustrations of citizenship and of government, I thought as an humble American, sitting in that gallery of the English Parliament, that if our American youth could have caught the words and inspiration of that great commoner of the English people, they would have had a higher appreciation of our Republic and the opportunities open to them as citizens under a democracy of sovereign States. If this Republic is to be perpetuated, and our nation's history embellished and continued for ages to come in the bright domain of forensic eloquence, it will find its lights and supporters and its brightest advocates in the profession of the law. I wish to say, Mr. Chairman, that I can only regret that the sponsor to this toast is not here to give the sentiment and the embellishment that it merits. If the Bar Association of the State of Michigan will carry out the purpose for which it was organized and intended, the time will come when at the Bar banquets and dinners, we may have in this State from our members, from the young as well as the old, some bright exemplifications of forensic genius, and some that will make the citizens of the State at large as a community, feel proud that we have a Bar Association, and that its members take an interest in its success and welfare.

In conclusion, permit me to say that at the future Bar dinners of this Association, when a member is selected to respond to a sentiment and accepts, that he should take pride enough in the occasion and the event to be present and respond in such a manner that, the stenographer taking it down, it may go into the literature of this Association as one of the brightest efforts that has ever characterized forensic eloquence in Michigan. In this extempore effort I feel assured that your generous indulgence will award one merit. Friendship for our worthy toastmaster in his emergency alone prompted me to presume upon your patience, for as the gifted poet happily expresses it,

"Farsweeter than the choicest gift which nature can impart,
Is friendship, whose pure, tender tones breathe music to the heart."

MR. O'BRIEN: I had not intended to say that I was an associate of Mr. Russell's at Ann Arbor as long ago as 1864, but he has told you and he has told you the truth, in fact he is a truthful man. He has never failed in anything I have asked him to do, and he has not done so now. It is true that his response to the sentiment just given is entirely spontaneous and that he had only a few hours' notice that he would be called upon. It occurs to me to suggest that if he can do so well on such short notice, what might he not have done if he had had a week's notice as did the gentleman whose place he took.

There is another gentleman here to-night, not a citizen of Grand Rapids, who has kindly consented to read us a paper. I will not occupy your time beyond introducing to you Judge Michael Brown, of Big Rapids.

JUDGE BROWN: The young man who decides to make the law his profession, has but a feeble idea of the enormous work before him. After he has decided to study law, the next important question is where to begin. Some commence by reading the local works on practice, and the State statutes; some by reading the standard works on equity jurisprudence, evidence, contracts or commercial law. All who begin this way find out, sooner or later (the sooner the better for them), that they have commenced at the wrong end of the course. A person might as well commence a college course by entering the senior class. The place to commence the study of the law is at the beginning. Commence with the history of the common law; then study Blackstone and the books that bring the science down to our time. When studying the common law the student finds traces and maxims of the civil law. This law must be carefully studied in order to fully understand the jurisprudence of our own country, because we have adopted the best rules of all systems. The civil law, Rufus Choate said, "is founded upon the robust practical sense and justice of Rome, the law-giver of the Nations."

We often hear people talk about "reading law." No man ever became a lawyer by reading law. To become a lawyer, a person must study law, study it in the sense the student must study mathematics, or any other science, in order to become proficient therein. A good many members of our profession have always been prejudiced against law schools. But experience has demonstrated that the place to study law is in a law school. This is necessarily so. A busy law office is no place for a student to study. The owner of the office has no time to devote to students. The student should be engaged in learning the elementary principles of the law, while the lawyer is engaged in applying rules of law to particular cases and hunting, until his brain fairly whirls, for exceptions to general rules. After a student has completed a course of study at a good law school, it would be of great use to him to continue his work in an office for at least one year before commencing the practice. The standard for admission to our profession is rising. The law schools are enlarging and

lengthening their courses of study. They are also requiring a higher grade of scholarship in order to be admitted to the schools. The courts, too, are strengthening the rules for examination for admission to the Bar. If these methods are strictly enforced, they will materially aid our profession, more especially those who come into it hereafter. Some members of our profession make a mistake in following the theory that the only subject that a lawyer is required to study is law. It is not disputed that a lawyer should be a diligent student of law, and for the same reason that any person should be a diligent student of the business in which he is engaged. But the law is a peculiar profession; it is the most learned of the professions, because its members are required in their practice to investigate every avocation in which the human race is engaged. Therefore, to be the useful man that any member of our profession should be, both to the community in which he lives and to himself, and those immediately connected with him, he should have at least a general knowledge of almost every subject. If he has a general knowledge, and it becomes necessary for him to acquire a more exact knowledge of any subject, he will be equipped for the work. I hold that a large amount of this general information should be acquired by the members of our profession while they are young, and before they are admitted to the Bar. There is no danger of learning too much. Cicero said, more than twenty centuries ago, "There is no knowledge but may be of use to a lawyer," and the saying is as true now as it was then.

"Law is the science in which the greatest powers of the understanding are applied to the greatest number of facts." If this general information is not acquired before admission to the Bar, it must be acquired afterwards. In this age of books, a person cannot read everything, yet a member of our profession should devote some time to general reading. Lord Bacon said "Reading maketh a full man; and if he read little, he had to have much cunning, to seem to know that he doth not." I once heard a very eminent member of our profession, who had then practiced for more than forty years, say that the study of the law alone does not expand the mind, but contracts it and causes it to run in a groove. This may be true. The continuous study of any subject does not tend to a general enlargement of the mind. If a lawyer devotes his spare time to making a brief upon some subject in which he is interested, outside of his profession, he will find it of immense advantage to him in his professional duties. The majority of the members of our profession, however, realize all these things and practice them to such an extent that lawyers are usually the best informed persons, upon all subjects, to be found in their several communities.

The members of our profession are ordinarily attentive to their duties. This is a part of their education. They are drilled from the time they enter the profession until the time they leave it, in promptness and punctuality. When a member who has never acquired a reputation for promptness is elevated to the bench, he generally becomes a model of exactness, and insists upon everybody about his court being precisely on time, which proves, if proof is necessary, that even those who are not very prompt in their duties know how to be so. While I am upon this subject, I wish to say a few words to those members of our profession who are not present at this meeting. If there is any institution in this State in which every member of our profession should be deeply interested, it is this State Bar Association. This is our second annual meeting. I take it that every lawyer in the State knows that it is being held, and knows when and where it would be held, at least a sufficient length of time to have been present. Some, no doubt, have excellent reasons for not attending. A large number have no excuse whatever; they should be here. It is the duty of the absentees to send in their excuse so that we can pass upon them and decide whether they are sufficient or not. No organization can be as useful to the Bar of this State as this organization. We are taught that "unity is the strength of all institutions. The lawyers should be united and there

is no way to do so except by means of Bar Associations. This Association will yet be a power for good in this State, not only to the members, but to the people at large. We can and will reform the practice where reformation is needed. We must prevent vicious, foolish and useless legislation; we must see to it that just laws are reasonably enforced; that wrongs are redressed and rights maintained. We will also take care that our profession shall remain in such a condition that it will continue to be greatly respected by all good people. I submit that a large majority of these absentees should be here to help us, and be helped by us.

There is another thing associations like this will ultimately do. They will put the seal of their condemnation upon useless and unnecessary law books. Mr. Bishop has given it as his opinion that a committee of lawyers should be appointed, and that the manuscript of every book should be submitted to this committee before publication, and if the committee should decide that the book would be either useless or unnecessary it should not be published. Whether this would be practicable or not, I will not attempt to determine, but it is certain that something should be done by the members of our profession to lessen, if not stop this excessive publication of new books, as well as new editions of old books. The newer text-books have come to be used only as digests. Nobody thinks of citing one of them in a brief expecting the court to pay any attention to it, or even look at it unless it may be to find the cases cited in the notes. Reports, too, are increasing with marvelous rapidity. Cowper was of the opinion that reports should be written in poetry. The reasons he gave were, they would be more easily remembered and would be "divested of that infinite circumlocution and the endless embarrassment in which they are involved by it." They would, he said, "become surprisingly intelligible in comparison with their present obscurity." If this opinion of Cowper (which was given in 1780) had been adopted, writers of poetry would be in good demand this year, as there will be about three hundred volumes of reports published in this country.

We should have much sympathy for the lawyers of the future. It does not seem to make any difference how many times the same question is decided the same way, it must appear in the current reports, and we pay for them. It would seem as if some plan could be devised by which this re-reporting could be prevented. Long arguments are made in all of our courts, for the only purpose of determining whether a previous case applies to and rules the case under consideration, and at last the wisdom of the court is brought to bear upon the question whether the case cited does or does not apply, and the question is decided in an opinion from five to twenty pages long. The English language, the most expressive language ever evolved from the jargon of barbarism, is potent enough to make legal opinions and decisions so clear that there can be no argument as to their meaning. The principal difficulty with our courts and especially with our State Courts is, they are expected to do at least double the amount of work they can do well or even reasonably well. If they do not do it and do it with technical accuracy, the class of people who insist that law "is common sense" but who have no idea whatever of the meaning of the words "common sense," or either of these words, raise the hue and cry that the courts are indolent, extravagant, regardless of the public money, and that the administration of justice is fearfully expensive. And on account of this public clamor the judges, like other people, "make waste" because they try to "make haste." How to remedy this evil is a hard question. Some very good people say "eliminate politics from the contest for Judges." They are simply proposing an impossibility. As long as our institutions endure—I pray they may never perish—people will as a rule vote for their party candidates for judges as well as for all other offices. Some say "appoint the judges." I believe this is the best method of selection, because I think history proves that the appointed courts are generally more independent, and stronger than elected courts, but after all the appointive power is elective and

the president or governor who did not nearly every time appoint judges of his own political faith, would be considered by any political party or organization now in this country, in fact by a large majority of voters, at least as not a good candidate for renomination. And as long as men are mortal, they will desire both to be renominated and re-elected.

The fact that a member of our profession is elevated to the Bench does not make him immaculate. He still possesses the same hopes and fears, desires and ambition he did before he was either elected or appointed. Humanity will be humanity, in all stations and conditions in this life. Yet the Bench must come from the Bar, no matter how selected. The standard is high. Here it is as stated by one of the most eminent members of our profession the world has yet produced—an American lawyer: "And, finally, he must possess the perfect confidence of the community, that he bear not the sword in vain. To be honest, to be no respecter of persons, is not yet enough; he must be believed such." I should be glad to so far indulge an old-fashioned and cherished professional sentiment as to say, that I would have something of venerable and illustrious attach to his character and function, in the judgment and feelings of the commonwealth. But if this should be thought a little above or beyond the time, I do not fear that I subject myself to the ridicule of any one when I claim that he be a man towards whom the love and trust and affectionate admiration of the people should flow; not a man perching for a winter and summer in our court houses, and then gone forever; but one to whose benevolent face, and bland and dignified manners, and firm administration of the whole learning of the law, we become accustomed; whom our eyes anxiously, not in vain, explore when we enter the temple of justice; towards whom our attachment and trust grow even with the growth of his own eminent reputation. I would have him one who might look back from the venerable last years of Mansfield, or Marshall, and recall such testimonies as these to the great and good judge: "The young men saw me and hid themselves; and the aged arose and stood up." "The princes refrained talking, and laid their hand upon their mouth." "When the ear heard me, then it blessed me, and when the eye saw me, it gave witness to me." "Because I delivered the poor that cried, and the fatherless, and him that had none to help him." "The blessing of him that was ready to perish came upon me, and I caused the widow's heart to sing for joy." "I put on righteousness and it clothed me. My judgment was as a robe and a diadem. I was eyes to the blind, and feet was I to the lame." "I was father to the poor, and the cause which I knew not, I searched out." "And I brake the jaws of the wicked, and plucked the spoil out of his teeth."

Our profession can now furnish the kind of men here described, and has always been able to do so. What other of the learned professions can do better? The members of our profession, as a class, have always been and now are the most industrious, determined and active brain-workers in this country. They always have and do now direct our legislation and formulate our jurisprudence. Their influence for good cannot be overestimated. A member of our profession composed and wrote the declaration of independence, the greatest document the world has yet seen. Another member of our profession was the chief promoter and advocate of this same declaration, and caused its adoption, the first long step in the march of our country to its present grandeur. Of the fifty-six signers of the declaration twenty-seven of them were members of our profession. Members of our profession made George Washington Commander-in-chief of the American army. Our profession has given to the country all the Presidents of the United States but four, who came from the military service. It was a member of our profession—Abraham Lincoln—who conceived, wrote and issued the Emancipation Proclamation, which broke the shackles from four millions of slaves, and made them free human beings. We have furnished the most gifted and influential Cabinet Ministers, one of whom was the author of our present financial system. The fourteenth and fifteenth amendments

to the Constitution of the United States were adopted as they came from the brain and hands of the members of our profession. It would require volumes to record even the most important of their grand achievements. Their impress for good is upon every page of our country's history and laws.

No class of people have been more fearless in the performance of their duties. They defend the weak against the strong without fear of consequences, and many times without the hope of reward. Unaided, and without the sympathy of their best personal friends, they have stood between their clients and the whole power of the British Crown, again and again. In this country, they have many times defended the rights of poor friendless slaves, and thereby incurred the jeers, insults and threats of the enraged and dissolute crowd about them. I believe that no record will show that under such circumstances any lawyer ever shrank from his duty or was recreant to his sacred trust. It is on account of the stand taken by the members of our profession, that the law now is, "that the whole power of the State is not able to take the ewe lamb, or to trample upon a blade of grass of the humblest citizen, without adequate remuneration." And also, "that every man's dwelling house," no matter how large or how small, "is his castle, which winds and rain may enter, but which the government cannot." In the administration of justice, the members of our profession who sit upon the Bench are so rarely found wanting, that the rule that they are just and entirely fearless, may be said to be universal. No one who has not had judicial experience can fully appreciate the position of a person compelled by duty to decide a cause against perhaps his best friend, or against the church or political party of which he is a member. A person expects to be criticized by his enemies, but the man who does not dread the criticism of his friends with whom he comes in daily contact, would not be an ordinary human being. Yet judges decide, so to speak, against their friends every day. There are many notable cases of this kind—I will only call attention to one, *The People v. Blodgett*, 13 Mich., 127. February 5, 1864, the Legislature passed an act permitting soldiers from this State, then in the army of the United States serving in Michigan regiments, companies and batteries to vote wherever they were stationed. This act was attacked as being in conflict with Sec. 1, Art. VII, of the Constitution. The Court knew that to hold the act unconstitutional would disfranchise a very large number of citizens who, prompted by patriotic motives, had enlisted in the army. These soldiers and their friends constituted an overwhelming majority of the people of Michigan. The Court was friendly to and in deep sympathy with this majority, and with the cause in which the soldiers were engaged. But the Court also believed that the act in question was in conflict with our State Constitution, and so held. Criticism, slander and vituperation followed. Time has, however, vindicated that decision, and it is doubtful whether a person, competent to judge, could now be found who would not say it is right.

Because our courts do right—decide right—people everywhere have confidence in them. Only a little while ago, the Republic of Chili, with whom our country was having serious complications, proposed to submit the justice of its cause to our highest court. Whatever may have been the opinion of those who did not hear the cause tried, I assert that if that cause had been tried before the Supreme Court of the United States, the decision would have been just, and strictly according to the rules of international law, and the people of Chili knew it. The members of our profession who administer the law in our courts follow the divine command: "Hear the causes between your brethren and judge righteously between a man and his brother, and the stranger that is with him. Ye shall not respect persons in judgments; ye shall hear the small and the great alike; ye shall not be afraid of the face of man."

The members of our profession have been subjected to many unjust and wicked criticisms. These criticisms come from two sources:

First. From a class of people who have at some time or times in their lives been prevented from succeeding in some wrongful and fraudulent scheme through the ingenuity and skill of an honest lawyer. This class of slanderers are generally wealthy and strong, and have the same hatred of law they do of lawyers. They are hostile to lawyers and law, for the same reason they prefer darkness to light, "because their deeds are evil."

"No man e'er felt the halter draw,
With good opinion of the law."

Second. From a class of persons who repeat the slanders circulated by the first class named, for the purpose of currying favor with said first class, and to amuse the ignorant. This group of persons may usually be known by their custom of meeting lawyers on the street and other places and putting hypothetical question to them which cover actual cases, so as to obtain opinions without paying for them. Also by talking in a sort of an off-hand, general way, to some excellent lawyer about a case, and then if anything comes of the case claiming that the lawyer has been retained on their side. Both are very annoying; they, however, do not do much harm. We know as well as Pope,

"The world with calumny abounds,
The whitest virtue slander wounds;
There are whose joy is, night and day,
To talk a character away."

All business complications, at the present time, are in the hands and control of lawyers. Notwithstanding the present influence and greatness of our noble profession, it is progressing. The world always has been led by intellectual force. If it continues to be in the future, no fears need be entertained for the members of our profession. If mind is master, the bar will rule.

Mr. O'BRIEN: I doubt whether it is necessary gentlemen to put to a vote our universal thanks to Judge Brown for his most excellent paper.

There has lately come to live in our midst a young gentleman who, with his associates, has undertaken the publication of a law journal in the State of Michigan. He has not only shown good judgment in taking up this publication in a patriotic way, but he has further shown his good judgment in coming to Grand Rapids to reside. It may be that he is not yet overwhelmed with briefs, but he has only to keep on, and with the good character which he already bears and the industry he has already shown, to meet with success in the future. I refer to Mr. Harry D. Jewell, who will give us something on the "Literature of the Law."

MR. JEWELL: *Mr. President, and Gentlemen of the Michigan Bar Association—* It is with quite a great degree of temerity that I appear before a body of men like this to speak to-night, and I have no doubt that that temerity will be noticed long before I am through, and my speech will be short, too. I appreciate this honor, gentlemen, and as I stand here face to face with men who have grown old in the legal profession, and whose gray hairs, but still beaming and pleasant faces, bear witness of long, faithful and prosperous lives in the active pursuit of the grandest of professions, it is but natural that I should give way to a few slight feelings of pride. Pride, not of that individual sort, not because I am the recipient of any particular favors, not because of the gratification of any personal vanity, but pride in the profession which I have just entered, because that profession is founded upon principles of justice which are deep enough, and the minds of whose members and followers are broad and charitable enough, to reach down the right hand of fellowship] and extend a hearty word of

encouragement to the young man. For that reason, gentlemen, I feel proud to be here to-night and, if nothing more, to be allowed to extend my thanks to you for the encouragement that you have given me. There is no profession, I am convinced, even though comparatively short is the acquaintance I have had with it, which extends such encouragement and holds out such inducements to the young men of America.

The first intimation that I received that I was to respond to a toast was about noon to-day, and I have been sitting here trying to devise some plan to get out of the predicament I am in. And when Judge Champlin spoke to us so briefly, I thought if Judge Champlin could get off so easily perhaps I might. I am reminded of a young man, a former student in the Literary Department of the University, who went over to Jackson, he and his brother, to dine with an old uncle. The old gentleman was a very devout old man and he undoubtedly thought that his young nephews had increased and developed in their sense of religious duty as well as in every other way, and so when they sat down to the repast he nodded his head at one of them and said: "Dick, will you please ask the blessing?" Dick hitched around a bit and finally said, "Uncle, I think I will ask to be excused to day." The old uncle looked very much surprised but didn't say anything, and, nodding to the other, said, "John, will you say grace?" But John only made matters worse by leaning back and replying in a reluctant and resigned tone, "Well, uncle, I guess I will have to pass, too." Now that is the way I feel, I feel as though I would like to pass, too.

I don't know what is expected of me in response to the toast, "The Literature of the Profession," whether or not I am to go back into the musty volumes of text-books, from Coke down to the last editions of Cheever's Probate Law, or from the earliest reports down to the 88th Michigan. But when the sentiment, the "Literature of the Law" was given to me I thought, it was a sort of duty to say at least a few words in acknowledgment of it. And just here I must stop and tell of an incident of which I read yesterday. I don't know whether it occurred in Grand Rapids or where, but a certain clergyman was very earnest in his sermon one Sunday, and he had reached a very eloquent point when, raising his voice with all the enthusiasm which stirred him, he exclaimed: "Where is the drunkard? show me the drunkard! the most unfortunate of all men, show him to me! show him to me!" A certain old judge away back in the congregation rose in his seat, and with considerable difficulty steadying himself in his place, exclaimed: "Well, sir, here I am." The clergyman realized on his in-vestment so much sooner than he expected that he didn't know what to do, but finally some one came to his rescue by pulling the old judge down. The incident was about forgotten when the good old clergyman reached another eloquent part of his address and again raising his voice with all the fervor of his heart, he shouted, "Where is the hypocrite? where is the hypocrite? the most dispicable of all men. Show him to me! show him to me!" Again the old judge arose in his seat and reaching his cane forward over the second pew in front of him and poking a shaky old deacon who was sitting there exclaimed: "Deacon! Deacon! why the devil don't you get up when you are called on."

Now, I don't know as the sense of "duty" impels me quite to such an extent as it did the old judge, but when the sentiment, "Literature of the Law," was suggested to me, I did feel it a duty to respond. As the President has told you, I had the honor, if I may be permitted to call it such, of being one of the founders of a branch—a very small twig it is now, to be sure, but it is what we hope in the near future to grow into a well-developed branch—of the literature of the profession. I will restrict myself to the periodical portion of legal literature; but I cannot dwell upon all those many periodicals which have now come to be a necessity in a well-appointed law office. You doubtless know that in this country we have over one hundred standard publications, one daily, several weekly, a large number of monthlies, and one or two bi-monthlies, which are regular visitors to all law offices. So I will confine myself to the MICHIGAN

LAW JOURNAL, in which I am more particularly interested. This latest venture into the field of legal literature was conceived only last winter. We encountered many obstacles when we first conceived the idea of publishing a law journal. Among the first persons we spoke to, of course, were the law faculty of Ann Arbor, and their encouragement helped us in giving the paper a start. The students at Ann Arbor gave us a quite hearty support, and finally we decided to embark upon the enterprise. We appealed to the alumni of the University, for if there is any person who takes a pride in his University it is the alumnus of the University of Michigan. And if he is not enthusiastic in his support of anything that effects the welfare of the University, there is something wrong about him. When you see a U. of M. man who does not take a pride in the University and uphold its banner at every opportunity, you may know that his record at Ann Arbor was not what it should have been. We next applied to Judge Cooley, and after considering the matter, he finally decided to give us his hearty support, and those who have read the past numbers of the JOURNAL will know that he has not only given us support by his word, but in a more tangible way, in the excellent contributions he has given us.

I understand there was once something of the kind started which did not prove a success, and therefore we have had considerable trouble in getting the Bar of Michigan to see their way clear to interest themselves in this JOURNAL. I remember last spring that I visited a few cities in behalf of the JOURNAL, calling the particular attention of the leading lawyers to the paper. In Muskegon I went into the office of a certain gentleman, who is here to-night, and talked with him about it. He asked, "What assurance have we that this journal is going to be kept up?" and other questions of that kind, but after some considerable talk he finally decided that he would risk it. He finally subscribed and has now become one of our most earnest supporters. I went into the office of the ex-president of this Association. He was busy looking over a brief at the time, but I sung my little story, as I had it pretty well learned by that time, and although engaged in important business he finally glanced up and said: "Well, what do you want of me?" I said "I want you to subscribe for the JOURNAL." I did not suppose he knew what I had been talking about, but I found I was mistaken. He became interested and he has ever since been one of our best and most earnest supporters. We have also received much encouragement from Judge Champlin. I remember being in his office at one time when Judge Brown happened to be in there. Judge Brown picked up the JOURNAL, said he: "That article by Judge Cooley is worth the price of the paper; send it to me." So you see the JOURNAL don't need to be talked about. It is doing its own "booming." That is the way it has been started. We appreciate the help you have given us here to-day, at your meeting, by recognizing it as your official organ. We will continue our efforts to help hold up the standard of the profession if it can be done by means of the JOURNAL. The pages of the JOURNAL are free to you to use for an interchange of ideas on the topics of the day, and we ask you to use and support it and in return we hope to do something for the legal profession.

At the conclusion of Mr. Jewell's remarks, Mr. L. P. Eddy sang a song.

J. S. Lawrence responded wittily to the toast, "Forensic Ethics," after which Mr. Eddy sang "Rooked in the Cradle of the Deep."

MR. O'BRIEN: It was the intention of the local committee that we should have still another address upon the subject of the law, and what belongs to it. There is a branch left untouched, notwithstanding what has gone before. I refer to "Forensic Humor; Wit is the God of the Moments; Genius is the God of Ages." A gentleman residing in a sister city has kindly agreed to respond to this toast. He embodies in one person the eminence of a lawyer and also that of a soldier. I refer to Col. Irish, of Kalamazoo. [Applause.]

COL. IRISH: *Mr. Toasting Fork*—for I think you are entitled to be called by that title—I am confused by your introduction. I suppose that I ought to thank you for presenting me in this way before this audience. You have been kind enough to present one gentleman here as having a good moral character, and I shall remind this audience that many summers since I had one, and I can prove it by my application and by my admission to the Bar signed by an eminent practitioner—but that was twenty years ago—and you might have been kind enough to endorse it here to-night. I have doubted, Mr. Toastmaster, whether I had any right to speak to this assembly as a lawyer, for I heard my friend, Judge Brown, speak of a lawyer as being the owner of a law office. Now, perhaps he is correct in his assumption, but if there are any lawyers here who own their own law office I would like to have them hold up their hands, and if any considerable majority vote in the affirmative, I must sit down and not attempt to answer this toast as a lawyer.

I will say further, Mr. Toastmaster, that a few days since I found a letter awaiting me, stating that I was requested to respond to a toast upon this occasion, and to reply by telegram and to make it short. I had just returned from the State Convention and my brain was naturally a little crowded and I thought perhaps it was because of the mixing of the law and politics. But I see some other gentlemen who were at that Saginaw convention, and perhaps they may not think that would be a correct recipe for the mixture. At any rate I was in a little doubt whether it was in response to the toast or telegram that I was expected to be short. I felt in my pockets to see if I had any money left and I found the telegram would necessarily be short. (Applause and laughter.) The letter went on to apologize for the brief time it would give me for preparation, but very kindly intimated that I might make my response as short as the notice was. It made me think of a long communication that Daniel O'Connell once wrote to a newspaper, and he wound up with an apology for writing such a long letter and said he didn't have time to write a short one. I mention this little story of O'Connell's so you may all naturally expect me to make a long talk, and if, instead of a finished oration upon this to you a very serious subject, I should happen to break down in the few informal remarks the surprise to you will be simply refreshing.

I wish to say one other thing, gentlemen, and it is perhaps very appropriate, considering the deep and solemn music we have had, that when one is called upon to respond to such a toast as this it naturally suggests solemn thoughts. I come from a Bar that never has a Bar meeting except when the fraternity get together to pass resolutions over some poor lawyer that has entertained them at his funeral. (Laughter.) I believe this is not the only Bar in the State that is open to this charge, but Kalamazoo is a very healthy place and these occasions have not happened often enough (laughter) to have given me very much practice upon the sentiment "Forensic Humor." (Laughter.)

Mr. Toastmaster, I do not remember ever to have heard such a toast proposed at any of our Bar meetings, but we do try to do justice to the subject that is before us. (Laughter.) I remember one occasion in particular, when we had been called upon to part with a younger member of the profession, one, Mr. Toastmaster, who had been called away early from trials that the rest of us had to meet in our pathway of life. The resolutions that were passed over him were very fine and glowing in their terms. They were, in fact, better calculated to immortalize the rhetorical genius of the gentlemen who had prepared them than the short career of our young friend in the legal profession. (Laughter.) But we wanted to do what was right by him. (Laughter.) The next day a stranger came into the office and was talking over the affair with a law student. This young man had a habit of talking very slowly and deliberately, a manner that some unkind persons used to call drawing, and he asked him something like this: "What kind of a reputation did young Mr. Jones have as a lawyer?" And this young law student, who expected to be a young lawyer himself after a time, drawled back with the utmost disregard of the fictions of the law, "He didn't have any until the Bar gave it to him in their resolutions." (Laughter.) I am afraid there

is a deep and far-reaching meaning in that one remark, and even where a glowing tribute is deserved it is one of the grim humors of the profession that we too often neglect it until, as my eloquent friend who has just spoken upon the "Forensic Eloquence" of the Bar might say that the impassioned lips were silent under that seal which speech has never broken, and the dark Plutonian shadows have gathered around our comrade, and until the words of earth can have no meaning to him. But, Mr. Toastmaster, up at that convention the other day, that did not really seem to apply. There were a great many lawyers who presented the names of candidates for nomination—that is, some of them turned out to be presented for nomination—(laughter) and they didn't wait until they were dead to speak of them in the most remarkable terms as to their worth and ability, and as I listened to those glowing eulogies a solemn thought came into my heart, and I wished I could be spoken of when I died as those candidates were when they were living, (laughter), because Mr. Toastmaster at that particular time I could not bear to think of being sent for any length of time to a place as hot as that convention. (Laughter.)

The profession of the law is not such a very funny affair. One cannot be expected to draw from its experiences a beverage that shall always be brimming over with laughter. Sometimes there comes a sparkle upon the strong beverage of every-day practice that gives a life to the wine—and we all like our champagne dry. Sometimes there is something coming up that relieves the serious side of the profession; but what I want to say to you is that it is not the killingly funny things that do us the most good, it is rather that humor that is companionable, good natured, that makes it pleasant for us to meet our friends—the enemy in the court-room. It is far more pleasant when it is present than to meet a lawyer who makes a jury trial an occasion for bitter, personal satire. No one can expect me, Mr. Toastmaster, to go over the whole of this subject, to do justice or even equity to it, but it occurs to me there is one branch that I might speak of here to-night, which it is not always safe for the lawyer to talk about. When the Court is in session we can seldom talk about the Judge. He has a per centage over us in the way of contempt proceedings, that we have great respect for. But it occurs to me, Mr. Toastmaster, that the most common and every-day subject of humor of the profession comes in where the Judge is not in a position to really enjoy it or even understand it. Whenever there is a trial it unfortunately happens that somebody has to be beaten. It is one of the unsolved problems of the courts how to decide a case so as to satisfy both sides. It is notorious that individual judges have toiled with heroic patience to unravel it, but still, like the will-o'-the-wisp it has thus far eluded the grasp of the most eminent judicial minds. If a case is ever decided so that both sides laugh, the smile of one of them is generally a sardonic grin. A judge on the bench misses the satisfaction that comes to him, if he could only hear the compliments paid him by the losing side, if he could only hear them in their pristine freshness, but gentlemen, every judge knows that he gets them just the same. (Laughter.) I have sometimes thought that if I were a judge, whenever I beat a fellow I would find some way to get extra costs against him, or sentence his client for a year longer for the jokes he is about to perpetrate (Laughter), "over at the tavern, you know." Why, it is enough to make every Circuit Judge wish to retire to the Supreme Bench, where he can divide the responsibility. (Laughter.) It is said, I do not know from what authority, that almost all the Circuit Judges of the State are to-day willing to accept an appointment upon the Supreme Bench, and what other reason can there be?

I have great respect for a Circuit Judge. He is an eminently respectable gentleman who is compelled to go gunning for lawyers with a breech loading shot-gun, to shoot birds on the wing with right and left barrels as fast as the keen scented pointers of the Bar put them up for him, but if any wounded drakes happen to flutter away into the Court of Errors where it generally takes a good retriever to get them back, I submit it is not the proper thing to make game of him behind his back. The Judge of the Court of Errors can do a different kind of thing. He is a Creedmoor rifle, taking sight-

shots at any long range target he can get at any elevation, and sometimes it is said he can set the wind gauges on his rifle so as to allow a point or two for the prevailing winds of popular opinion. (Laughter.) It always occurred to me that there was another great advantage in their kind of shooting. Wherever on the target a bullet happens to strike that spot immediately becomes a bull's eye. (Laughter.) It is said that patient and laborious students of reports have discovered that occasionally a motion for a rehearing has demonstrated that the score was on the wrong target. (Laughter.) Possibly they may be right in their conclusion. I don't dispute it, and I suppose, Mr. Toastmaster, that in speaking of the gentlemen who sit upon the Bench of the Courts of Error in the United States that my subject makes it a matter of privilege for me to speak freely. I suppose that I am privileged just as much as one of the court fools of the mediæval ages was who could tinkle the bells on his cap and rail even at the King himself, else I should not dare to say anything of this kind in this presence.

Now, Mr. Toastmaster, to get beaten in a law suit, is I am convinced a wise application of some general law of evolution. It is not generally understood, perhaps, especially by the lawyer on the losing side, and yet if it were not so the wit and humor of the profession, and better than all, the spirit that can laugh defeat in the face, would be largely lacking. If it were not for the spice of defeat and victory I don't know what there would be in the practice of the law. It would not be very interesting to practice law where there was no question about the result. Anybody could do that. But I submit that it takes a good lawyer to go into court and take his chances. There is a glorious uncertainty about it that makes up the cream of the practice. It does not make any difference whether one lawyer or the other comes out at the head of the battle; there has been a fight all the same. Somebody has won the palm of victory and somebody is left in the sorrow of defeat. What would we do if it were not for defeats in law suits that we try? The man who is not good-humored when he is defeated would not be good-humored when he is victorious. I have sometimes thought that this thing would all pass away; that all the trouble of the defeated man at the bar would sometime in the process of evolution be done away with. Indeed, Mr. Toastmaster, I believe that sometime far on in the renaissance of jurisprudence that you and I shall never see, that the lawyer whom the goddess of fortune smiles upon will behave himself like a gentleman; he will show by the pleased, humorous expression of his countenance that he is not at all vain but he will watch the opportunity to get up in one way or another on her blind side to engage her for the next cotillion. (Laughter.)

It is out of the sorrow of defeat, Mr. Toastmaster, that the discipline of patience comes which presses on to higher victories. I am convinced that a Circuit Judge or a Supreme Court Judge, who is laughed at by the losing side, is really conferring a benefit upon humanity, and that he knows that, "The blood of the martyrs is the seed of the church." (Laughter.) The lawyer who goes over to the tavern and laughs at the Judge and roasts him sufficiently is often satisfied at that, and does not take any appellate proceedings. In this way vexatious litigation is saved and perhaps the Judge saves the Court one trial more of the cause. This discipline which comes from defeat is always especially appreciated—when it applies to the lawyer upon the other side. (Laughter.) It is possible to acquire that judicial calmness which can look upon the chastened spirit of the other lawyer defeated with the most placid equanimity. It can be acquired even in as great a measure as was enjoyed by the leaders of the Inquisition, who were enabled to look upon the tortures of the victims with calmness because they knew it was for their spiritual welfare. I had intended, if I had had more time—and I understand it is your fault Mr. Toastmaster, that I did not—if I could have found a comic copy of Blackstone, to compile a long list of epigrams attributed to our profession. Modern society calls them by a more dogmatic name—I won't mention it here, but, if I had that compila-

tion here I could remind you of it. I have no doubt it would be very refreshing to you if I could tell the stories I have heard related in the Clerk's office of the Supreme Court. The smoke was curling up from our cigars and we waited while the Court was hearing some case where the time had been extended in a case that was ahead of ours, and the Judges in the Court room were listening with rapt and breathless attention to the argument, while they were hoping that our case would soon be on the call when we would regale their appetite for legal argument with long, but interesting speeches. But I remember the application of the story that was made to a lawyer who talked too long. I remember that life is short, and that the committee asked me to be short, and I remember that Zaccheus was short, and if I told all these stories I should expect to climb a tree the way he did.

The banquet we are enjoying to-night is one of the seasons of rest and laughter and wit and humor that come to the bar. We are to-night enjoying ourselves because we are getting acquainted with our own sect, and this is an hour that will live in memory long after the lights in this hall have been extinguished. There is only one thing more that I wanted to say and that is that it is not the wit that flashes and sparkles into laughter that makes the best humor of our profession, but it is rather the honest cheery laugh and the kindly word of a good lawyer who loves his profession, who, in spite of all their faults—and we know they are many—has a respect and a liking for the members of his profession, that helps us out on the pathway of life. It belongs only to the man who has cultivated human sympathy and the better feelings of his nature. It cannot be counterfeited, for it comes from those deeper springs no mortal ever sounded. The sparkling flash of the bright steel of wit cannot take its place, for it is like the sunlight of nature that so often lightens up the rugged pathway over which we must travel. It helps to make good comrades of lawyers. It reaches further and deeper in its influence than any profession, be it ever so honorable, for that influence will be felt as was said by the poet, Coleridge, when he said:

The knights are dust,
Their good swords are rust,
Their souls are with the saints I trust.

MR. O'BRIEN: This banquet, as you all know, was given to lawyers. It is true there are some other gentlemen present whom we call judges, but they have been lawyers, only they have been raised up. It would be unfair, perhaps, in view of what has taken place, that they should not have an opportunity to speak and an opportunity to be here represented. There are several of them present and I can do no better for your entertainment, nor in the performance of my own duty, than to ask Justice Morse to reply.

JUDGE MORSE: *Mr. Toastmaster—Gentlemen of Bar*—This is rather an unexpected summons to me at this hour, and I do not know that I can sufficiently collect my thoughts to say anything of particular interest. In the first place, I am not a story-teller, but I have been very much interested indeed in the remarks of our brother from Kalamazoo. It must be remembered that under our system of judicial government there is hardly any judge who has not been a lawyer and who has not shared in all the trials and troubles of the profession. It requires, as some of you have intimated a considerable amount of patience for a Judge to listen to arguments at times, but when I was a lawyer it required a good deal of patience upon my part sometimes to read the judgment of the Judges. (Laughter.)

Our profession, as has been said, is a most honorable one and one in which we have to work hard to succeed and one where we are not trusted as implicitly as we ought to be by the common people; is one that is not without honor. Sometimes there are unworthy members of our profession, who bring upon us unjust reproach

as a body. While this is so it has yet been our good fortune, especially in our Republican form of government, to mould public opinion and to make and administer the laws, and upon the profession of the law rests the substantial foundation of justice in this country, and not only that, but of our freedom and of our liberty. Wherever in the whole history of our government any question has arisen respecting the rights of man the foremost champion of right and justice has ever been the lawyer. He has stood in the fore-front of the community in defense of correct principles of liberty upon which we suppose and trust our government is founded. While the life of the lawyer is a hard and toilsome one, and the man who succeeds as a lawyer must work, not only physically but mentally, from morn until night, and have upon his shoulders the cares of his clients, their fortunes, perhaps their liberties and their lives, there is this great consolation, that he is moulding public sentiment and government for all time to come. To-day the responsibility of this great Republic rests upon the shoulders of our profession. Wherever bad laws have been made in the legislatures or in Congress it has not been the fault of the lawyer, and wherever good laws have been made it has been owing to the efforts of good lawyers. Take the Legislature of Michigan for instance, take the Congress of the United States where good lawyers are lacking, and bad laws come as a matter of necessity. There are few cranks among lawyers. These visionary schemes in law as well as politics do not originate with lawyers. The lawyer is intelligent, progressive, conservative, and does not very often go off on tangents, but he rests upon the solid foundation of law and upon the rights of man.

As to the Circuit Judge and the Supreme Judge we are of just the same constitution that we were when we were lawyers, and the members of the Bar probably know that. It was always a great consolation to me when I was a lawyer to win a case, it was a great sorrow to lose one, and perhaps I have been as impatient a lawyer as any one in this room; a man of quick impulse and of quick retort in speech. It has been my misfortune to rail as many times at Judges as any member of the Bar here, and yet perhaps within a year or two I would be satisfied that I was wrong and the Judge was right, and yet there are upon the records of our Supreme Court opinions which have never met my judgment, simply because I was beaten in the case. We all have our feelings, we all have our impulses, we all have our judgment. They are weak and erring as all human judgments always are. It is a habit, but I think lawyers will compare favorably with any other class in the community.

It has been said sometimes as a matter of reproach, that lawyers are not honest, but in the short time that I have been upon the earth, about fifty-four years, I have found that lawyers as a class are as honest as any set of people in the world if not more so. They live up to the obligations of contracts. They hold that courtesy between man and man that is due from one man to another, holding that high and honorable position in private life, that a good man should hold, and if you take our profession and compare it with any other avocation in life you will find, and I may say it without egotism, that the lawyers stand foremost among the people of the earth. It remains for us but to go on in the same way we have gone, looking after the interests of the people, great and small, rich and poor alike, and to see to it that the foundations of our government lay broad and deep upon the principles of justice, and see to it that they shall not be withered away by unwise legislation, growing out of the popular clamor of the fanaticism of the hour, and see to it that we look forward and move forward in the way in which our father's planted this government, and upon you, gentlemen, rests the responsibility of being true to your country, to your God and to mankind.

Upon the call of Mr. Russell, Edwin F. Uhl responded to the toast, the "Bar of Grand Rapids," and the dinner ended by the singing of "Auld Lang Syne."

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE, *Treasurer*,
ELI R. SUTTON,

H. D. JEWELL,
J. E. ROBERTS.

OFFICIAL PUBLICATION MICHIGAN STATE BAR ASSOCIATION.

Published monthly, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

Address all correspondence to MICHIGAN LAW JOURNAL, 24 Widdicomb Building, Grand Rapids, Mich.

EVERY member of the Michigan State Bar Association should subscribe to the official publication of the Association, the MICHIGAN LAW JOURNAL, in order to keep in touch with the Association and its objects. The JOURNAL, hereafter, will be bristling with matter of interest to members of the Association, contributed by those who are most deeply interested in sustaining and perpetuating the Association. In order that the JOURNAL may reach every member of the State Bar Association, we make the following liberal offer, with the understanding however, that it can be taken advantage of only by those members of the Bar of the State who have shown spirit and pride enough in their profession to encourage the objects of the State Bar Association by identifying themselves with it: We will insert a lawyer's business card, three-quarters of an inch long and one-half a column in width, and also send the JOURNAL for one year, for the sum of \$3.00 This is wonderfully cheap. The subscription price is \$2.50 per year, and the advertisement therefore, will cost but fifty cents.

WE CALL the attention of our readers to the resolutions that were passed by the Michigan State Bar Association, assembled at Grand Rapids on July 26, adopting the MICHIGAN LAW JOURNAL as the official publication of the Association, and particularly to that portion of the resolutions which say, "The members of the Association are urged to support the MICHIGAN LAW JOURNAL by subscribing to it, by rendering it such other financial support as they are able, and by contributing to it articles upon questions of general interest to the profession in the State."

THE CASE of the hardware dealer in St. Louis, who was charged with "stealing electricity" by tapping an electric light wire and thus securing illumination free, has been terminated by the discharge of the accused. The judge would not concede that the offense was petit larceny and the

Grand Jury would not say that it was fraud. So, when the case came up, the attorney for the accused entered a plea for formal acquittal which was concurred in. This is the first case of its kind, and is but the forerunner of a number of legal problems of difficulty in which electricity will be involved.

THE fifteenth annual meeting of the American Bar Association will be held at Saratoga Springs, N. Y., on August 24, 25 and 26. On the morning of the 24th, the president will read his address, members and general council will be elected, reports of secretary and treasurer and executive committee. In the evening papers will be read by John W. Cary of Chicago, on "Limitations of Legislative Power in Respect to Personal Rights and Private Property;" by W. L. Snyder of New York on "The Problem of Uniform Legislation in the United States." On the morning of the 25th, the annual address will be delivered by John Randolph Tucker of Virginia. The rest of the day will be consumed by reports of standing and special committees. On the 26th, in the morning, the election of officers and the transaction of miscellaneous business will take place, and in the evening the annual dinner will be given.

THE SUPREME COURT of Michigan has just rendered a very interesting decision concerning mining law, and the dower rights of women in mineral lands. The opinion is written by Justice McGrath, in the matter of James B. Seager, *et al.*, and is an able and thorough discussion of the law on the subject, in which the cases bearing upon the question are fully collected and commented upon. The *gravamen* of the question before the court was whether, under the general statutory provisions, a widow is excluded from all interest in the minerals in lands which at the time of the death of her husband were unimproved and unproductive, although such lands may be rich in minerals, and owned, held and known as mining lands, and chiefly and solely valuable for the minerals contained in them. In answer to this question, Justice McGrath says, in part:

"From my examination, I have been unable to discover that this precise question has ever been passed upon by any court in this country. Text writers generally, and in some of the following cases, none of which involve the question of an unopened deposit, the courts lay down the rule that a widow is dowable of mines which had been opened at the death of the husband, but that she may not open new mines even upon the land set apart to her as dower; in other words, that a widow is not dowable of mineral deposits where there is no opened mine. * * * The strict rules of the common law of England respecting waste and the rights of tenants for life, do not obtain here. With us, the change in the mode of use is not waste. It is not use but abuse that is waste. * * * The rules applicable to a country where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a commonwealth like ours, where estates are small and the policy of our laws is to distribute them with each generation; where dower is one of the positive institutions of the State, founded in policy, and the provision for the widow is a part of the law of distribution, and the aim of the statute is not subsistence alone, but provision commensurate with the estate. In the present case, the grant is by operation of the statute giving the use of all the lands of which the husband was seized. The grant

must be held to include the use of these lands, irrespective of whether mines were opened upon them before or after the husband's death. The question here is not the impairment of one mode of enjoyment, or source of profit, to reach another. There is but one mode of enjoyment of the land in question; but one source of revenue or profit. The land is susceptible of but one use. The widow is therefore entitled to one-third of the amount in the hands of the petitioner."

UNDER the heading "Lawyers as Notaries Public," the *Chicago Legal News* says: "The Supreme Court of this State, in the recent case of *Linck v. City of Litchfield*, commented severely upon the practice of attorneys taking affidavits before themselves as notaries in cases in which they act as counsel. The Court says this practice is generally discountenanced by courts, but the proceedings can not be treated as a nullity, and if the other party takes no steps to set aside the proceedings in apt time, the irregularity will be waived. In some of the States we think such affidavits are prohibited by statute."

There is such a statute in this State (H. S. § 637) which provides that it shall not be lawful for notaries public who are attorneys and counsellors at law, or solicitors in chancery, to administer oaths in causes in which they may be professionally engaged. Two decisions of the Supreme Court, *McCaslin v. Camp*, 26, Mich., 390, and *Snyduer v. Hemingway*, 47 Mich., 549, doubtless paved the way for and brought about this provision of the statutes. After fifteen years' trial, many good lawyers have come to doubt the wisdom of such a statute. In its practical workings, it is said by many to accomplish but one result, and that is additional annoyance and loss of time to the busy attorney, by compelling him to leave his office to find a notary to take the affidavit of his client, when time and secrecy may be absolutely necessary to his cause. The main reason for the passing of such statutes is the prevention of fraud. But the statute is of very little use in that respect, as the notary before whom the attorney brings his client rarely, if ever, reads the affidavit which the affiant swears to, or has any knowledge of the matters contained in it. It may be urged that the law will tend to prevent the forgery of affidavits by unprincipled attorneys. This argument can have but little force, for it is extremely doubtful that one who is so far lost to the sense of professional honor as to be guilty of such an act, would hesitate to forge one more name to the paper. It would seem that a better way would be to keep such a class of men, if there are any who would resort to such acts, out of the profession entirely, by raising the standard of admission to the Bar to such an extent as to exclude them. This would seem to be a far more feasible and effective way. Though there may be much force in the argument of the friends of the law that it should be retained as a safe-guard, yet the opposers of the statute are not without many and strong reasons for their opposition.

THE RESIGNATION OF MARSHALL D. EWELL, M. D.—Marshall D. Ewell, M. D., lecturer on medical jurisprudence in the Law Department, University of Michigan, has resigned his professorship in the Northwestern University Law School because of certain differences between himself and the president of the University, Dr. Henry Wade Rogers, who was formerly Dean of the Law Department, University of Michigan. In view of the facts, as they appear in the letter of resignation there is no doubt but that Dr. Ewell acted wisely in severing his connection with the N. W.

U. Law School. Dr. Ewell's grievances were four in number: First, the action of the president on important questions without consulting the law faculty; second, decrease of salary and increase of work; third, organization of an evening school and post-graduate course without the concurrence of the law faculty; and fourth, change of methods of teaching. It seems that quite as much dissatisfaction existed among the remainder of the law faculty.

Concerning the action of the president in making radical changes, Dr. Ewell says: "Oandor here compels me to state that all these changes were made by the president without, so far as I know, (and I have inquired of my associates in the regular faculty), previously consulting and advising with his then faculty of law. Indeed, to the best of my knowledge, information and belief there has not been a single faculty meeting in the proper sense of the term, during the entire school year just ended, nor at any other time during the presidency of Dr. Rogers; but courses have been decided upon in advance and presented by President Rogers to the members of the faculty individually, for execution, without opportunity for previous joint consideration or discussion which the importance of the issues would seem to require and usually receives." If the law faculty, during the presidency of Dr. Rogers, did not meet at all, there must be truth in what Dr. Ewell says. The faculty of a professional school connected with a university is created for the express purpose of consulting with the head of the university, and at every other university in the land their opinions have no little weight in the determination of questions affecting the administration of the department. We know of no other university in the country, except Northwestern, where the president of the institution alone and unassisted directs the affairs of the professional schools. At the University of Michigan, the law faculty has frequent meetings, and with the exception of a general supervision of the business of the department, President Angell does not take part in the routine of the faculty meetings. The second of Dr. Ewell's causes of resignation was the reduction of the salaries of the law professors from \$2,500 to \$1,500, without previous consultation with them. An objection for this reason was certainly not to be wondered at, especially as immediately afterwards a night school and a post-graduate course were established with only \$500 increase in salary to be paid, with this remarkable proviso, viz., "if there were any funds remaining after paying expenses." At the University of Michigan a full professorship has a salary of \$2,200, or nearly sixteen dollars per hour, and at Northwestern University at \$2,500, the law professors received nearly seventeen dollars per hour. The service of the Michigan professors is 140 hours, that of Northwestern, before Dr. Rogers made the change, was 150 hours. It will readily be observed, therefore, that Northwestern's professors, according to the Michigan standard, were not overpaid, and Dr. Ewell's remonstrance against a doubling of the hours of service and a decrease of 40 per centum in the salary was not without justification. Dr. Rogers' final step was to make a radical change in the methods of instruction without seeking the views of those who were to carry the changes into effect. Dr. Ewell concludes his letter by showing that since Dr. Rogers assumed sole charge of the affairs of the law school, the attendance has steadily decreased. Differences between the president and faculty of an educational institution are always to be deplored, but if facts are as Dr. Ewell states them, it is hardly to be wondered that his resignation should have followed.

On the other hand, it is claimed by the authorities of the Northwestern

University that Dr. Ewell did not resign for the reason stated by him but that he was asked to resign, and that his salary was reduced, and his work increased for the purpose of forcing his resignation. Be that as it may, it is certainly unfortunate that differences should have arisen between an entirely worthy and competent instructor and the head of an educational institution like Northwestern.

A new law school, "The Union Law School," will open in Chicago during September with Dr. Ewell at the head of it. Whether the organization of this school is the result or the cause of Dr. Ewell's resignation, we are not prepared to state. It will undoubtedly draw from the N. W. U. Law School, for Dr. Ewell was very popular with the students of that school. In the *Chicago Legal News* of July 23 appears a letter from one of the former students of the N. W. U. Law School, now a practicing lawyer, in which Dr. Rogers is severely scored and Dr. Ewell's course defended. In this letter is the following paragraph: "I have before me a copy of the catalogue of the University of Michigan for 1891-2, in which I find this name among the faculty members: 'Marshall D. Ewell, LL. D., Chicago, Ill., non-resident lecturer on Medical Jurisprudence.' I have also before me a letter written by President Rogers, commending Judge Ewell as a lecturer to the faculty of that institution. Is it not somewhat remarkable that the President of the Northwestern University did not discover Professor Ewell's inability to lecture until the question of opening a new law school was brought to light?"

STATE BAR ASSOCIATION MEETING.—Owing to the intense heat and the consequent disagreeable travelling, the attendance at the second annual meeting of the Michigan State Bar Association, at Grand Rapids on Tuesday, July 26, was not very large from outside of Grand Rapids. But what the gathering lacked in numbers it more than made up in enthusiasm. The proceedings were marked by more spirit than was shown at the first annual meeting, and this was due no doubt to the fact that a considerable number had come to the meeting prepared to take part in the discussion of the important questions that are now occupying the attention of the Bar of the State. This discussion centered around the address of the President of the Association, Thomas J. O'Brien, Esq., in which a number of vital questions were handled with ability and in which many original and valuable suggestions were made. The meeting demonstrated more than anything else that there is a wide field in which the State Bar Association can work, not to benefit the profession alone, but to do a vast amount of good for the people of the State. An organization composed of the leading jurists and lawyers of the State, is capable of exerting a powerful influence upon the legislation of the State. United action on the part of such a body would operate as a most powerful agency for the accomplishment of almost any commendable and useful purpose.

There were many things, however, brought to light at the recent meeting, which should be criticised, and which it is our purpose to comment upon without regard to the effect it may have upon the feelings of any one or all of the members of the Association. In the first place, there should be a larger attendance at the meetings. It is easy to promise to attend the annual meetings, but it seems to be easier for many to send telegrams or letters at the last minute expressing their interest in the Association and its objects, sending greetings to those who have shown *active* interest enough to be present but regretting their inability to be present

themselves, an "inability" which we fear proceeds more from lukewarmness than from any other cause. Sickness or important business alone, should excuse members of the Association from attendance at the annual meetings. The very objects of the Association, the reasons for its existence, can be effected only by a full attendance of members. These objects as expressed in the constitution are "to advance the science of jurisprudence, promote the administration of justice, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the Michigan Bar," and without the last, which we have italicized, the others cannot be accomplished.

There are many other things that might be commented upon at length. The constitution should be thoroughly revised. It is too cumbrous, and its provisions have not been observed in a number of instances. Although it is a matter of opinion, yet many think that there are entirely too many officers. The method of admitting members, as provided in the articles of association, differs from the constitution, the former placing the power of election in the board of directors, the latter in the Association, after recommendation by the local council to the general council and nomination by the latter body. The constitution provides for two members of the local council in each congressional district, besides the vice-president from each of these districts, but no more than one has ever been elected. The constitution provides for the annual meeting during the first week of June, but this year it was called for the twelfth day of July and adjourned until the 26th. At the recent meeting, not one of the six standing committees had prepared a report, and the annual reports of the secretary and treasurer were read by a temporary secretary.

In view of these things it becomes important that the time and place of the next annual meeting be appointed so that a large attendance will be assured. Mr. O'Brien's suggestion, in his address, that one of the lake resorts be selected and the meeting be extended three or four days, is the best yet advanced.

LATE DECISIONS OF THE MICHIGAN SUPREME COURT.

ESTATE OF IDA JACOBIA v. TERRY.—*June 10.*—(Grant, J.)

Guardian and Ward—Compensation of Guardian for Ward's Board.—Where a guardian receives money belonging to her ward and boards the ward for a term of years, she is entitled to credit for such board, and can be compelled to account only for the money she received with interest, less the amount of the board.

IN THE MATTER OF JAMES B. SEAGER, *et. al.*—*June 10.*—(McGrath, J.)

Dower in Mineral Lands—When Mines Unimproved at Husband's death.—A widow is entitled to dower in minerals in lands, which at the time of the death of her husband were unimproved and unproductive, where such lands were rich in minerals and were known as mineral lands, and chiefly and solely valuable for the minerals contained in them.

HURLEY *et al.* v. WATSON.—*June 10.*—(Long, J.)

Ratification—Inference of Acquiescence from Knowledge and Silence of the Principal.—If the principal is aware of the course of dealing of his agent with a third party, and it appears from the evidence that such knowledge accompanied by the silence of the principal amounts to acquiescence, it may be inferred that the principal has ratified the acts of his agent.

GORDON v. MCGINNIS.—*June 10.*—(Long, J.)

Mortgage—Fraudulent Obtaining of Mortgage—Amount Payable in Redemption.—An arrangement between a mortgagee and mortgagor, by which the former, agreed to save the latter a portion of the amount, will be enforced in a Court of Equity and a decree will be granted allowing redemption by the mortgagor upon payment of the amount due, less the sum agreed to be saved to him by the mortgagee.

PEOPLE v. ROHER.—*June 10.*—(Grant, J.)

Assault with Intent to do Great Bodily Harm, less than Murder—Specific Intent.—If a person shoots into a crowd with intention to wound any of them, he is guilty of assault with intent to do great bodily harm, less than murder, upon each one of the crowd, notwithstanding he had no specific intent against the person injured. (*State v. Nash*, 86 N. C., 650; *State v. Myers*, 19 Ia., 517; *Smith v. Commonwealth*, 1 Pa. St., 324; *R. R. C. C. 1. Bailey's Case*; *Rex v. Lovell*, 2 M. and R., 39. *Contra*, *Lacefield v. State*, 34 Ark., 275; *Scott v. State*, 4 S. W. R., 750.)

YOUNG v. OHIO FARMERS' INSURANCE COMPANY.—*June 10.*—(Montgomery, J.)

Insurance—Proofs of Loss—Waiver.—Although a policy of insurance contains an express provision that proofs of loss must be furnished within a certain time after loss, and that no agent can waive any provisions of the policy, yet the offer of such proofs by the insured and refusal to receive the same by the adjuster of the company, will operate as a waiver of the requirement. A statement by the adjuster, that the proofs of loss that the insured had prepared were not required was equivalent to a refusal of the proofs of loss. *O'Brien v. Ins. Co.*, 52 Mich., 131, and *Gristock v. Ins. Co.*, 87 Mich., 428, followed.

PEOPLE v. TEN ELSHOF.—*June 10.*—(Montgomery, J.)

Information for Carnal Knowledge of Female Child—When Precise Time and Place Not Material—Failure of Justice to Certify Finding—Presumption of Assault.—In an action under statute for having carnal knowledge of a female child under the age of fourteen years, the defendant will not be permitted to set up that the offense was committed at a different time and place than that charged in the information when there is no doubt as to the occasion referred to. The mere failure of the justice to certify to the circuit court his finding that the offense has been committed will have no effect when it does not appear affirmatively that he has refused to pass upon the question. (*Turner v. People*, 33 Mich., 364; *Cargen v.*

People, 39 Mich., 349; *Ganer v. People*, 34 Mich., 286). The information is not defective because it introduces the element of assault; as the law conclusively presumes that the female within the age fixed by statute is incapable of consent, the act is by force and arms. (*People v. McDonald*, 9 Mich., 150). *People v. Jenness*, 5 Mich., 305, distinguished.

MORSE V. WILLIAMS.—*June 10.*—(McGrath, J.)

Certiorari, Omission of Party's Name in Return to Writ of—Omission of Material Facts in Affidavit.—Where the name of a party, in proceedings to clear out and tile a drain, does not appear in the return to a writ of certiorari, removing the proceedings to the Circuit Court, and the affidavit does not set forth that he is liable to assessment for the expense of the work, nor that he has any interest to be affected by the proceeding, the writ must be dismissed.

STUYVESANT, V. WILCOX.—*June 10.*—(Morse, C. J.)

Mental Incompetency—Undue Influence in Obtaining Execution of a Deed.—Where the execution of a deed is obtained by the exertion of undue influence and fraud upon the grantors, husband and wife, the husband being weakened in mind by advanced years and sickness, and the wife having, through more than half a century of married life, depended upon the will of her husband, the deed will be cancelled, and defendants be ordered to re-convey the premises to complainants.

In Re. Estate ABRAM L. POWER.—*June 10.*—(Montgomery, J.)

Widow's Allowance for Maintenance—Discretion of Probate Judge.—Under Section 5847, How. Stat., the widow shall have such reasonable allowance out of the estate as the Probate Court shall judge necessary for her maintenance during the progress of the settlement of the estate, according to her circumstances. The amount of such allowance is left to the sound discretion of the Probate Judge, and appellate courts will not interfere except where there has been an abuse of such discretion. *Freeman v. Probate Judge*, 79 Mich., 390.

DODGE V. DODGE.—*June 10.*—(Montgomery, J.)

Maintenance and Support of Parents—Effect of Misrepresentations and Cruel Conduct upon a Deed and Contemporaneous Agreement.—A conveyance from parents to children, and an agreement between them, by which the latter should furnish the former a comfortable home, board, etc., will be cancelled and annulled and a re-conveyance ordered by reason of certain misrepresentations that the children made to the parents and because of their cruel and unkind treatment towards their parents, rendering it impossible for the latter to continue to live with their children.

REYNOLDS V. REYNOLDS.—*June 10.*—(Montgomery, J.)

Remanding Suit for Trial—Divorce—Alimony.—In a suit for divorce by a woman, in which the defendant has answered, denying the allegations of complainant's bill and setting forth such independent grounds for divorce in his answer as might have been set up in a cross-bill, a divorce may be properly granted to the defendant, but alimony should ordinarily be allowed to the complainant, and unless allowed the case will be remanded to the court below, with directions to hear proofs and determine the question of alimony. Costs of appeal and additional allowance for solicitor's fees will also be allowed to complainant.

MANSFIELD V. MANSFIELD.—*June 10.*—(Montgomery, J.)

Maintenance and Support of Parents—Construction of Clause as to Place of Support.—The clause, in an agreement for support between parents and children accompanying a deed of property to the children, which reads, "Such care and provision to be furnished them only in case they make their home with said parties of the first part," should be considered with reference to the surrounding circumstances of the parties, and when so construed expresses an intention that the children shall make a home for the parents on the lands conveyed and covered by the agreement and life lease. *Blum v. Bush*, 86 Mich., 206; *Bird v. Pope*, 73 Mich., 783.

DANIEL V. DANIEL.—*June 10.*—(McGrath, J.)

Partnership—Actions Against Surviving Partner, By Whom Brought—When Statute of Limitations Begins to Run.—Where the surviving partner collects a partnership debt, while the deceased partner's estate is being administered, the action for the share of the deceased partner accrues in favor of his estate and should be brought in the name of the administrator. If six years have elapsed since the action in favor

of the estate has accrued, and an action for deceased's share of such debt is brought by the sole heir of the deceased, such action is barred by the Statute of Limitations, although the heir was a minor when the action occurred in favor of the estate. *Ten Eyck v. Wing*, 1 Mich., 40-45; *De Mill v. Moffatt*, 49 Mich., 125.

PERRY v. SULIER & GOLDEN.—*June 10.*—(Grant, J.)

Malicious Prosecution—Probable Cause—Liability of Attorney for Advising Prosecution.—In order to maintain an action for malicious prosecution, it is incumbent upon the plaintiff to show want of probable cause and malice. The fact of discharge upon the examination is not, of itself, conclusive evidence of probable cause and malice, which may be inferred from want of probable cause. (*Hamilton v. Smith*, 39 Mich., 226, cited.) Where the facts are submitted honestly and fairly to an attorney at law, and he advises prosecution, and his opinion is justifiable, the person, receiving such advice is justified in acting upon it and the attorney is not liable in an action for malicious prosecution. *Huntington v. Gault*, 81 Mich., 155.

MALINIEMI v. GRONLUND.—*June 10.*—(Morse, C. J.)

False Imprisonment—Want of Reasonable Ground for Arrest.—If a private person directs the arrest of, or himself arrests a man on suspicion of felony, without a warrant, and it turns out that the wrong man is imprisoned, he must show in justification: First, that a felony has been committed; and second, that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed it or was implicated in it. (2 *Addison Torts*, sec 803 and cases.) Where there is no reasonable ground for the arrest and defendant had taken no pains to find out who the plaintiff was, the former is answerable to the latter in damages. *Malcomson v. Scott*, 56 Mich., 459.

STUYVESANT v. WILCOX.—*June 10.*—(Long, J.)

Assault and Battery—Exemplary Damages—"Smart Money."—In an action for assault and battery, resulting from a dispute over the possession of certain personal property, it is proper to show in whom the title to the personal property rested, for if the title was in the person assaulted he is not a trespasser when going upon the land of the defendant to recover the personal property. (*Cooley on Torts*, 2d ed. pp. 52, 53, and cases there cited.) In measuring exemplary damages, the jury are not justified in going beyond an amount that shall fairly compensate the party entitled to them. (*Ross v. Leggett*, 61 Mich., 445.) Any instruction which may lead the jury to suppose that they have the right to punish the defendant by compelling him to pay "smart money" is erroneous. *Mooney v. Kennet*, 19 Mo., 551.

LILLEY, Administrator, v. MCBRIEN, et. al.,—*June 10.*—(Morse, C. J.)

Insurance Policy—When Assigned as Collateral Security—Money Paid Into Court—Testimony in Probate Court, Oral or Written.—Where an assignment of a life insurance policy is made by way of security for advances made by assignee to assignor, the assignee will be compelled to re-assign the policy when tender of the full amount of the advances, with interest, is made by the administrator of the assignor to the assignee. Pending litigation between the administrator of the assignor and the assignee, as to the right to receive the full amount due upon the policy, the insurance company will be permitted to pay into court the amount due upon the policy, without interest. Testimony in Probate Court must be taken upon written interrogatories. *Palmer v. Circuit Judge*, 50 N. W. R., 1086; *How. Stat. Sec. 5877*.

FORT STREET UNION DEPOT Co. v. BACKUS.—*June 10.*—(Long, J.)

Condemnation Proceedings—Setting Aside Award of Jury for Excessive Damages.—A circuit judge may make an order setting aside the award of a jury in condemnation proceedings, although the jury are judges of both law and fact, if it appear that undue influence is used by improper and misleading arguments of counsel, or by bribery. The undue influence may be shown to the court by affidavit or oral testimony and he is bound to act upon it. It is not essential in Michigan that the proceedings of a jury or of commissioners in condemnation proceedings be in the presence of a judge, but they are bound to render a decision in accordance with true legal principles, and their decision is reviewable by the court. Under the general railroad laws of the State of Michigan one railroad company cannot condemn the property belonging to another railroad company, except for terminal use as switches, yards and depots, and then only when the property of the company sought to be condemned is unoccupied. Under this provision the land which may

be unoccupied for the time, but which is held by the railroad company for use in the future in case of increase of business, which is reasonable to suppose will be had, cannot be condemned. (See 50 N. W. Rep., 646.)

DURFEE, Judge of Probate, etc., v. JOSLYN *et al.*—June 10—(Morse, C. J.).

Administrator's Bonds—Effect of Judgment upon General Bond upon Recovery on Bond to Sell Real Estate.—A judgment upon a general administrator's bond will not bar a recovery upon a special bond to sell real estate, though a balance due from the sale of the real estate formed one of the items for which recovery was allowed in the first suit. The bond on sale of real estate is only an additional security for the moneys coming into an administrators' hands, and does not supercede the general bond or affect it in any way; and the representatives of the estate are entitled to recover upon both bonds, with the only limitation that they cannot recover more in both suits than the whole amount due from the administrator, and no greater sum upon the special bond than has been realized from the sale of real estate under it.

MICHIGAN STATE BANK OF EATON RAPIDS V. TROWBRIDGE *et al.*—June 10.—(Morse, C. J.)

Mortgage, Foreclosure of—Liability of Mortgagees as Indorsers to Assignees for Balance of Debt after Sale of Premises—Effect of Assignment to Cashier of a Bank—Under Sec. 6704, How. Stat., mortgagees who have indorsed the accompanying note in blank are liable to assignees (although they are not the immediate assignees of the mortgagees) for balance of mortgage debt remaining unsatisfied after sale of mortgaged premises, although the intermediate assignees are not made defendants in suit to foreclose. (Cook v. Brown, 62 Mich., 478-479; Robbins v. Brooks, 42 Mich., 62.) An assignment to the cashier of a bank "his successors and assigns forever" is to be construed as an assignment to the bank. Gorton v. Union City National Bank, 84 Mich., 278-279.

WOLF V. HORTON.—June 10.—(McGrath, J.)

Ejectment—Title under Adverse Possession—Title under Contract for Purchase—Averment of Tax Title in Third Person.—Where the defendant in a suit for ejectment showed, by his course of dealing of many years with the guardian of minor heirs, that he understood the title to certain property to rest in the heirs, he is precluded from disputing the title of the heirs and he cannot claim title himself by adverse occupation. Where a person enters into a contract for the purchase of land, he will not be permitted to dispute the title of the grantor, under the rule that lessee cannot dispute his landlord's title. (Wood's Landlord and Tenant, Sec. 236; Dubois v. Mitchell, 3 Dana (Ky.), 336; Love v. Edmaston, 1 Ired. (N. C.), 152; Williams v. Carle, 27 Ga., 507.) One who claims under adverse possession cannot set up an outstanding tax title in a third person. Falkner v. Beers, 2 Doug., 117.

CITY OF GRAND RAPIDS V. WIDDICOMB, *et al.*—June 10.—(Morse, C. J.)

Opening Street—Admissibility of Testimony as to Value of Adjoining Land—Measure of Damages.—A street will not be opened unless the local and general benefits of such opening equal the value of the property taken, and such benefits are measured by the cost of the compensation awarded to the land owners and not by the cost of the whole work of making the street passable or convenient for travel. Testimony as to the value of land adjoining that which is condemned for the purpose of opening a street, is admissible, if such testimony is offered by persons not parties to the controversy. (People v. Perkins, 27 Mich., 386; distinguished.) Damages shall be awarded, not only for the full value of the land condemned, but for injury to the remaining premises, and damages cannot be fixed at less than the lowest amount testified to, nor more than the highest amount. Damages are fixed by the jury.

THE PITTSBURGH AND LAKE SUPERIOR IRON CO. V. KIRKPATRICK.—June 10.—(Grant, J.)

Notice to Quit—Admissibility of Testimony of Plaintiff's Agent as to Such Notice.—In a summary proceeding to obtain possession of a house, where the plaintiff, through its general agent, caused a three months' notice to quit to be served upon the defendant, testimony upon the part of the defendant that the agent told him shortly before the notice was served that the plaintiff was going to send him a notice to quit, but that this was done to please one of the directors of the company, and that he need pay no attention to it, is inadmissible, because it amounted to an offer

to show a secret understanding between defendant and plaintiff's agent, contrary to the express terms of the notice. An agent cannot act for the principal in the same transaction in two inconsistent capacities, one favorable to his wishes and interest and the other hostile to them.

COOLEY v. HARRIS *et al.*—*June 10.*—(McGrath, J.)

Equity Pleading—When Specific Prayer for Relief not Required in Answer—Assignee of Mortgage—Liability as to Existing Equities.—In a suit in equity where the facts upon which the relief granted is based are fully set up in the answer, although not followed by a specific prayer for the relief to which such facts clearly entitle the defendant, the court will nevertheless decree substantial justice, treating the prayer as amended. The assignee of a mortgage takes it subject to existing equities; but where the mortgage which the assignee holds was given in part to pay off a pre-existing mortgage which the mortgagee of the mortgage assigned agreed to take up and discharge, retaining a portion of the consideration of his mortgage for that purpose, the assignee should not be held to suffer if this agreement is not carried out, and the amount of such prior mortgage should not be deducted in determining the amount he is entitled to recover.

BEECHER v. CITY OF DETROIT.—*June 10.*—(Grant, J.)

Taxation—Assessment of Tax to Pay Portion of Damages Awarded in Opening a Street where Land Assessed was Benefitted.—Where, in accordance with Act 124, Public Acts of 1883, a street is opened and graded and the owner of certain land is compensated for the damage occasioned by the opening, and the Common Council afterwards, in accordance with charter provisions relating to special assessments for collecting the expenses of public improvement, orders a tax to be assessed upon the land damaged, among other lands which have benefitted by the opening of the street, such tax is valid, and since the owner of the land in question has received compensation, he is foreclosed from raising any objections to the regularity of the proceedings. The discretionary power to assess proportionately the damages upon property which has benefitted by the opening of the street is properly lodged in the Common Council under their charter power. (City of Detroit v. Daly, 68 Mich., 509, cited.) It is not necessary that the same jury which awarded the damages should assess the tax for the benefit.

BRESNAHAN, Administrator, v. NUGENT.—*June 10.*—(Montgomery, J.)

Fraudulent Transfer—Matter not Alleged in Pleadings—Exempt Property—Statute of Limitations.—Where a debtor transfers, by bill of sale, all his personal property to defraud creditors and then disappears, and after the expiration of seven years an administrator is appointed who brings action against the assignee on the ground of fraudulent conveyance, it is error to permit the plaintiff to attack a conveyance of real property where the pleadings do not apprise the defendant of his intention to do so. The plaintiff cannot recover property which was exempt from the claims of creditors. (Buckley v. Wheeler, 53 Mich., 1; Fischer v. McIntyre, 66 Mich., 681; Freeheling v. Bresnahan, 61 Mich., 540, cited.) A judgment, that the transfer was fraudulent, which was rendered in another cause but between privies of the parties to this suit, the same question being involved, was conclusive as against the defendant in this suit. Miller v. Jacobson, 41 Mich., 90; Barker v. Cleveland, 19 Mich., 290, cited. Although seven years had transpired since the fraudulent transfer, the defendant assignee could not claim the benefit of the statute of limitations, because the right of action in favor of the creditor does not accrue until the maturity of the obligations against the debtor, and also because such transfer could not be attacked until a judgment had been obtained against the debtor.

KRANICH v. SHERWOOD.—*July 1.*—(Long, J.)

Contract of Sale—Fraud in Altering—Parol Evidence to Vary Terms.—Where an agent for the sale of certain personal property fraudulently and deceitfully alters the terms of the written contract, parol evidence will be admitted to prove such fraud, and the contract of sale will be vitiated by such fraud.

RANDALL v. EVENING NEWS ASSOCIATION.—*July 1.*—(Per Curiam.)

Amendment—Stipulations in Open Court.—Where counsel in a case have stipulated in open court that a case being tried in which the sufficiency of the pleadings is questioned, might be remanded with leave to the plaintiff to amend his declaration, and the proceedings thereafter to be under the rules, an order will be entered in accordance with such stipulation without costs to either party.

MOORE V. DAIBER.—July 1.—(Long, J.)

Commission for Sale of Real Estate—Promise to Pay “What was Right”—Amount of Compensation in the Province of Jury.—Where the administrator of an estate owning certain lots promised to pay a certain person “what was right” if he should find a purchaser, such a contract is a personal engagement of the administrator and he is obliged to pay whatever the jury conclude is due, and the determination of the amount of the compensation is within the province of the jury.

HEFFERON V. DETROIT CITY RY. CO.—July 1.—(Morse, C. J.)

Ejectionment—Street Railway Transfer Tickets—Obligation to Read Conditions Printed Thereon.—Damages cannot be recovered from a street railway company where a passenger has been ejected for presenting a transfer ticket that was void because the conditions printed upon it were not by him observed. Under an ordinance of the city of Detroit, the defendant company was not compelled to transfer passengers from one line to another for one fare, and the passenger, therefore, was obliged to read the conditions upon the transfer ticket. (*Frederick v. Ry. Co.*, 87 Mich., 342, cited; *Hufford v. G. R. & I. Ry. Co.*, 64 Mich., 631, distinguished.)

KEHOE V. ALLEN.—July 1.—(Montgomery, J.)

Negligence—Injuries by Fellow Servants—Liability when Employé Working “Over Time.”—In an action by a molder in a foundry for personal injuries caused by the use of an imperfect flask, where the flasks supplied to the employés were numerous and there is no evidence that they were required to use the imperfect flask in question, the fault, if any, is the fault of a fellow servant and not of the employers. (*Rawley v. Collian*, 5 N. W. Rep., 350; *MICHIGAN LAW JOURNAL* No. 1, p. 31.) An employé, while working in the line of his employment, even if working over time, is subject to the usual risks thereof.

HALL V. HECK, et al.—July 1.—(Long, J.)

Promissory Notes, Action on—Liability of Retiring Member of Firm where no Notice of Dissolution—Questions of Notice for Jury.—An innocent holder for value of promissory notes that have been endorsed by payee can recover on these notes against endorser and maker, where maker is a firm which has authorized one of its members to transact all the business of the firm, and, although one of the members left the firm before the notes were made, she is liable when no notice of the dissolution has been given to either payee or innocent holder for value. The question as to whether payee had notice of such dissolution is properly submitted to the jury.

LOVETTE V. ESSIG.—July 1.—(Morse, C. J.)

Pleading—Bill of Particulars—Effect of Refusal of Plaintiff to File.—The defendant in an action of assumpsit brought before a justice of the peace is entitled to a bill of particulars apprising him of the precise claim against him, and the refusal of the plaintiff to file such bill of particulars is a virtual discontinuance of his suit, and precludes him from giving any evidence in the case. The case should be dismissed when the motion is first made, and the fact that defendant afterwards consented to adjournments, or pleaded to the declaration, or joined in striking the jury, will not deprive him of his right to make the objection to the reception of any evidence upon the trial. (*Peterson v. Tilden*, 44 Mich., 169.)

HERRICK V. CARPENTER.—July 1.—(Long, J.)

Validity of Conveyance by One Executor where Other has Failed to Qualify—Death of One and Subsequent Qualification of the Other.—Where one executor named in a will fails to qualify, according to How. Stat. § 5835, and the other conveys certain property in satisfaction of a mortgage against the estate, and upon the death of the executor who did qualify, the surviving one subsequently qualifies, he will not be permitted to declare void the conveyance in satisfaction of the mortgage on the ground that he did not join with the other executor. How. Stat. § 5844. (*Vernor v. Colville*, 54 Mich., 281; *Alexander v. Rice*, 52 Mich., 451; *Wemiar v. Fath*, 43 N. J. L., 1.)

EVANS V. CALMAN.—July 1.—(Grant, J.)

Summons—Mistake of Date upon Officer's Return—Failure to make Defense when Summoned—Effect of—Homestead Land.—Where an officer serves a summons which was issued on March 2, 1888, returnable March 10, 1888, and the record of the officer's return shows that it was served March 3, 1888, the mistake of date in

the return corrects itself, it being an impossible one. A defendant who has been served with a summons, and fails to make defense cannot afterwards be heard in a court of equity. (*Wilson v. Coolidge*, 42 Mich., 112.) Where land has been levied upon, defendant in execution proceedings, cannot claim that it is homestead because she intended to occupy it at some future time, and therefore exempt, where houses have been upon it, rented and occupied by other parties.

GRAND RAPIDS SAVINGS BANK V. DENISON, *et al.*—*July 1.*—(Morse, C. J.)

Mortgage, Foreclosure of—Disposition of Collateral Notes and Chattel Mortgages where Wife's Property Covered by Mortgage—Ascertainment of Value of Property Covered by Chattel Mortgage.—Where certain real property of the wife of the mortgagor is covered by a mortgage, which is given for the debts of the husband, and the husband also deposits a number of notes as collateral with the mortgagee and gives a chattel mortgage to the same mortgagee and another chattel mortgage upon the same property to another creditor, the mortgagees of the real property will be compelled to apply the value of the notes, when collected, deposited as collateral and the value of the personal property covered by the chattel mortgage less the amount of subsequent chattel mortgages to the mortgage debt, before foreclosing the mortgage which covers the property of the wife; and the collateral notes not collected or accounted for must be returned to the mortgagors, and the record will be remanded so that proofs may be taken in the court below to ascertain the value of the property covered by the chattel mortgage.

ANDREWS V. BASSETT, Administrator.—*July 1.*—(McGrath, J.)

Election to Take Under Statute, Made by Guardian of Incompetent Widow—Jurisdiction of Probate Court.—An election made by the guardian for an incompetent widow, to take under the statute, instead of under the will of her deceased husband, and made with the consent of the Probate Court, is valid. In Michigan, probate courts have jurisdiction over all matters relating to the settlement of the estates of deceased persons and as to the estates of minors and all others under guardianship, the Circuit Court in Chancery having concurrent jurisdiction. The Probate Court therefore had the power to consent to the guardian's election. (Cited: *Bassett v. Durfee*, 87 Mich., 167; *Kennedy v. Johnson*, 65 Pa. St., 454; *People v. Wayne Circuit Judge*, 11 Mich., 393; *State v. Ueland*, 30 Minn., 277; *Collins v. Carman*, 5 Md., 503; *Penhallow v. Kimball*, 61 N. H., 596; *Young v. Boardman*, 97 Mo., 181, 188; *Van Steenwyck v. Washburn*, 59 Wis., 493; *Wright v. West*, Lea, (Tenn.) 78; *Smither v. Smither*, 9 Bush (Ky.) 230; *Lewis v. Lewis*, 7 Ired. (N. C.) 72; *Pinkerton v. Sergeant*, 102 Mass., 570; *How. Stat.*, Sec. 5844; *Sec. 5825*; *Digby v. Howard*, 4 Sim., 588; 2 Clark and Fin., 636; *Ashley v. Palmer*, 1 Merivale, 296; *Seesley v. Jago*, 1 P. Wins., 389; *Breasted v. Farmers' L. Co.*, 4 Hill, 73.)

LUCAS V. DETROIT CITY RY. CO.—*July 1.*—(Montgomery, J.)

Contributory Negligence—Competency of Testimony of Present Sufferings—Expenses of Sickness—Points not Made in Brief—Opinion Evidence.—Where the defendant, in a suit for damages for injuries caused by falling from a street car which was started suddenly before plaintiff had time to alight, fails to show contributory negligence on the part of the plaintiff, the latter can recover damages against the defendant street railway company. (*Railroad Co. v. Church*, 21 N. E. Rep., 31; *Railroad Co. v. Colburn*, 16 Atl. Rep., 208; *Wyatt v. Railroad Co.*, 55 Mo., 485; *Strand v. C. & W. M. Ry. Co.*, 64 Mich., 216.) It is competent to introduce testimony of plaintiff's statements of present sufferings, but statements of past sufferings must be excluded. (*Johnson v. McKee*, 27 Mich., 471; *Elliott v. VanBuren*, 33 Mich., 149.) Expenses of sickness incurred by plaintiff, a married woman, credit being extended to her solely, must be paid by her. (*Meade v. Martin*, 84 Mich., 306; *Hirshfield v. Waldron*, 83 Mich., 116.) Points not made in the brief of counsel, but made orally, assigning errors, cannot be passed upon, according to Rule 59 of the Supreme Court. (*Black v. Dawson*, 82 Mich., 485.) A doctor will be permitted to state whether a cause which it was alleged existed would in his opinion, as a medical man, be sufficient to produce a condition which it was claimed resulted from this cause. Ruled upon in *Fay v. Swan*, 44 Mich., 545.

PICKARD V. BRYANT.—*July 1.*—(Morse, C. J.)

Fraud—Good Faith on Part of Purchaser—Cross Examination of Adverse Witness to Prove Fraud—Testimony to Impeach Witness.—Where there are evidences that a firm has fraudulently sold property to a person unable to pay for it, the court erred in not pointing out to the jury the evidences of fraud in the case, and the lack of good faith on the part of the purchaser, properly to be considered by the jury.

Where counsel directs certain testimony, which the witness upon the stand had given in a previous trial of the same case, to be read for the purpose of impeaching the witness, and the court refuses to permit it to be read, and counsel then ask that it be read for the purpose of refreshing witness' memory, which request the court refused on the ground that he was bound by the object first stated, the court is in error in so ruling. (*Tooley v. Plummer*, 69 Mich. 346-350). Where a writ of attachment is taken out against goods in the hands of a person who, it is claimed, did not purchase them in good faith but received them by fraud upon the part of the vendors, in an action of trespass against the sheriff serving the writ, it is proper, when one of the parties to the alleged fraud, one of the vendors, is placed upon the witness stand for the counsel for defendant to cross-examine him, although he is a witness for plaintiff, and it is error to rule otherwise; and if the court rules such cross-examination improper upon the ground that counsel must wait for this proof until he has the case in defense, thus compelling him to call an adverse witness, he is at liberty to contradict such witness' testimony by other witnesses. (*Snell, v. Gregory*, 37 Mich., 500).

CLELAND *et al.* v. CASGRAIN *et al.*—June 10.—(McGrath, J.)

Bill to Quiet Title—Multifariousness—When Court to Make Objection—Jurisdiction of Courts of Equity—Estoppel.—The fact that the prayer in a bill in equity asks for different kinds of specific relief in relation to the same subject matter, against the same parties, and in favor of the same persons, does not make the bill multifarious. (Cited: *Wilkins v. Wilkins*, 1 Johns. Ch. 112; *Colton v. Rose*, 2 Paige, Ch. 396; *Varick v. Smith*, 5 Paige, Ch. 137; *Puterb. Pl. and Pr.* 51; *Ingersoll v. Kirby*, 1 Walker's, Ch. 65; *Murphy v. Clark*, 1 S. and M., 221; *Baines v. McGee*, 1 S. and M., 208; *Whitney v. Whitney*, 5 Dana, 327; *Hart v. McKeen*, Walker's, Ch. 416.) Where the defendant did not demur to the bill but simply reserved the privilege, by answer, of making the objection at the hearing, the court, of its own accord, and not the defendant, is to make the objection; but the court should not when it would be merely technical and when the object can be accomplished by the record as it stands. (*Payne v. Avery*, 21 Mich., 524; *Clem v. Bank*, 14 Md., 299; *Oliver v. Platt*, 3 How. (U. S.) 333; *Ohio v. Ellis*, 10 Ohio, 456.) The jurisdiction of courts of equity to set aside deeds and other legal instruments which are a cloud upon the title of real estate exists exclusive of any statutory provision upon the subject. (*Rowland v. Doty*, Harr. Ch. 3; *Ormsby v. Barr*, 22 Mich., 80; *Haddon v. Hemingway*, 38 Mich., 615; *Waterman v. Seeley*, 28 Mich., 77; *King v. Carpenter*, 37 Mich., 363; *Eaton v. Trobridge*, 38 Mich., 354.) The objection to jurisdiction can not be made after an answer setting up a hostile title. Where defendants have acquiesced in the sale to complainants and have received the benefits of that sale, they are estopped from setting up any claim to the property adverse to the claim under the deed to the complainants.

\$2.50. STANTON'S U. S. LAWYERS' DIARY AND RULE-BOOK, 1893,

MICHIGAN, WISCONSIN AND ILLINOIS.

Price, delivered, with your name inserted in the List of Attorneys, with address and location, \$2.50. This Diary and Rule-Book, has in the three years that it has been published in this State, established itself with the Bar and Bench, as evidence, by the continued use of the Book by at least 700 of Michigan's most prominent LAWYERS, besides many of the BENCH, and all proclaim it the only Diary that has ever been devised for the use of the Profession.

The 1893 Edition will contain many new features, besides a complete revision of the Rules, Terms, Notices and Notes of Issue, Stanton's Judicial Map of the State, the Post-offices, FEDERAL, STATE and COUNTY OFFICERS, to be elected at the coming Election in November, 1892.

Remember, if you want your name in the list, order before November 1st, 1892, as the Diary will be delivered on or about December 1, 1892.

Address all orders or inquiries, to the Editor and Publisher.

ELMER E. STANTON,
Attorney-at-Law.

LAW BOOKS, AND COUNTY, COURT, BANK AND OFFICE SUPPLIES.

State Agent for "CHALLENGE" EYELET PRESS and Eyelets, for Michigan.

Also Author of Stanton's U. S. Interest Table, from $\frac{1}{4}$ per cent. to 12 per cent. Stanton's OFFICE DOCKET and Law Register, the latest thing in the "Collection Register," "Loan Register," "Rent Register." All made for the use of the profession and are indeed labor saving devices. Be sure of the address,

49 LYON STREET, - GRAND RAPIDS, MICH.

WOOD & JOSLIN,
ATTORNEYS.

GENERAL - CIVIL - PRACTICE.

WELL EQUIPPED COLLECTION DEPARTMENT.

Refer to Circuit Judges, and all Banks and Wholesale Houses in this city.

OFFICE 4, 5 AND 6 MERRILL BLOCK, OPPOSITE COURT HOUSE, SAGINAW, MICH.

REUBEN HATCH. HARRY D. JEWELL.
HATCH & JEWELL,
LAWYERS.

GENERAL LAW PRACTICE—COMMERCIAL LITIGATION—PROMPT ATTENTION TO COLLECTIONS.

Refer to any Bank or Judge in the City.

OFFICES: 23, 24 AND 25 WIDDICOMB BUILDING.
GRAND RAPIDS, MICH.

RALPH STONE,**ATTORNEY - AT - LAW,**

Room 24, Widdicomb Building,

GRAND RAPIDS, - MICH.

T. A. E. & J. C. WEADOCK,**ATTORNEYS, COUNSELORS AND SOLICITORS.**

CRAPO BLOCK, CORNER OF CENTER AND WASHINGTON AVENUES,

BAY CITY, - - MICH.

"Out of Contracts, expressed or implied, declared or understood, grow all rights, all duties, all obligations, and all Law."

If you have a student, you can not put into his hands a more useful book.

JORDAN'S**Questions, Answers and Analysis to Anson on Contracts.**

By JAMES R. JORDAN,

[*Librarian of the Law School of the Cincinnati College.*]

ALMOST 900 QUESTIONS AND ANSWERS WITH AN ANALYSIS.

Questions of every conceivable sort concerning contracts are put clearly and answered briefly and to the point. The information conveyed is not buried in a maze of legal phraseology, but is put so plain that a "wayfarer though a fool, may not err therein."—*The Yale Courant.*

I have examined the work carefully and am much pleased with it. The questions and answers are such as the law of contract suggests, irrespective of the text-book studied and to the STUDENT OF ANSON THE WORK IS OF SPECIAL VALUE. PROF. J. C. KNOWLTON,

University of Michigan.

What particularly pleases me is the tabular analysis. All tabular analyses are useful; and the one made by Mr. Jordan is exceptionally useful, because, to an exceptional extent it enters into details. PROF. EUGENE WAMBAUGH, State University of Iowa.

PRICE, \$2.00. Mailed on Receipt of Price.

W. H. ANDERSON & CO.,

223 Main St., Cincinnati, O.

LAW BOOK PUBLISHERS.

MICHIGAN LAW JOURNAL.

VOL. I.

SEPTEMBER, 1892

No. 8.

LEADING FEATURES OF THE CODE OF CIVIL PROCEDURE.

HON. SAMUEL MAXWELL.

In those states which have borrowed the English methods as they existed prior to the year 1873, justice is administered by two distinct sets of courts, one legal and the other equitable, and each having its own system of procedure; and this is true although the same judge may preside in both courts. It is not the purpose of this article to trace the origin of the systems named nor to point out the differences between them. That these separate systems result in many cases in circuitous action and great delay in obtaining relief is well known and the tendency of legislation for the last half century has been to simplify procedure, determine as far as possible all the rights of parties in one action, expedite trials and reduce the costs of litigation. In 1846, the state of New York adopted a new constitution which contained a provision for the appointment of a commission to simplify the procedure in the administration of justice. In compliance with that provision three commissioners were appointed. David Dudley Field, then as now, a lawyer of great learning and ability, was a leading member of the commission. In 1848, they reported a Code which was approved by the Legislature the same year and became a law.

Section 69 declares that "the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs which shall be denominated a civil action."

Section 142 provides that "the complaint shall contain: *First*, the title of the cause specifying the name of the court in which the action is brought * * * and the names of the parties to the action, plaintiff and defendant. *Second*, a plain and concise statement of the facts constituting the cause of action without unnecessary repetition. *Third*, a demand of the relief to which the plaintiff supposes himself entitled. If a recovery of money be demanded the amount thereof shall be stated."

There is also a provision that neither presumptions of law, nor facts of which the courts take judicial notice need be pleaded.

The essential provisions of that Code have been adopted in many other states and countries. The court and names of the parties plaintiff and defendant, being given in the title of the case, need not be repeated in the body of the complaint, but the parties may be designated therein as plaintiff and defendant. In stating a cause of action inferences and conclusions of law from the facts stated are unnecessary. Thus, supposing the action to be upon a promissory note, it will be sufficient to allege the making and delivery of the note, set out a copy thereof, allege the failure to pay and that a specified sum is due from the defendant to the plaintiff thereon. Add an appropriate prayer.

So if the action is in equity, as a creditor's bill to remove obstructions from property of the debtor upon which the judgment creditor has acquired a lien, it is sufficient to set out: *First*, the recovery of the judgment, stating the parties, court and amount, that it remains in full force and unsatisfied; *Second*, that an execution has been issued thereon which for want of goods and chattels and other property of the debtor whereon to levy has been levied upon certain real estate of the debtor, describing it; *Third*, set forth the incumbrances sought to be removed, as where there has been a fraudulent transfer of the title, allege the facts as to the fraud and add prayer for relief.

The design of the Code Commissioners is shown by their report to the legislature in which they say "We propose to reduce the system of pleading to one of allegation merely, without reference to discovery * * so that the same form of allegation may be adapted to cases which have heretofore been distinguished as legal and equitable." The result has been to abolish the fictions and technicalities of common law and equity pleading and substitute in place thereof a simple statement of the facts upon which the right of the plaintiff to recover depends. Therefore it is unnecessary, in fact is improper, in a suit in equity to state collateral facts and circumstances on the part of the defendant, plead evidence, or to set forth certain questions which the defendant is required specifically to answer under oath, as the complainant cannot be used as a mode of examining the defendant for the purpose of obtaining evidence.

The defendant, however, must answer the facts stated in the complaint either by a denial or matter in avoidance, but as will presently be shown the answer is not to be used to elicit evidence. If the plaintiff desire the defendant's evidence he may cause him to be examined as a witness either before or on the trial of the cause. He may also require an inspection and copy or right to copy any account or instrument involved in the action which is in possession of the defendant.

The principles by which courts determine the rights, liabilities and duties of the parties to an action have not been changed by the Code. They remain substantially as under the common law and chancery systems. Therefore in stating a cause of action it must appear from the facts alleged that there is a liability of the defendant to the plaintiff to enforce which he is entitled to invoke the power of the court.

All good pleading is a species of logic in which the causes which produce the wrong are stated, and the right to relief should appear from the causes so set forth, and this rule prevails under the Code.

The distinction between actions at law and suits in equity, being abolished, therefore if it appear from the facts set forth in the complaint that the plaintiff is entitled to relief either at law or in equity his action will not be dismissed even if he has prayed for a judgment not warranted by either the pleadings or proof. If it is apparent that he is entitled to relief, the court upon such terms as to payment of costs as may be just will permit an amendment of the prayer or an amendment in any other respect so that the cause of action is not changed. It is unnecessary, therefore to insert in the complaint a general charge of confederacy. The jurisdiction clause that the acts complained of are contrary to equity, and that the plaintiff has no adequate remedy at law, or the prayer for process to bring the defendant into court and answer the complaint.

In pleading the performance of a condition precedent, it may be stated generally that the party duly performed all the conditions on his part. If this allegation is denied, the party pleading the same must prove on the trial the facts showing such performance.

The action is to be brought in the name of the real party in interest. Ordinarily this will be the person or persons entitled to the fruits of the litigation. There are certain exceptions such as trustees of an express trust, which need not be noticed.

Defects of form in a pleading may be corrected by motion.

Thus suppose the pleading to contain scandalous, irrelevant or redundant matter. It may be stricken out, care being taken not to include matter which should be retained. So if the allegations of the pleading are vague and indefinite a motion for the more specific statement may be made.

A demurrer will lie for six causes, viz : (1), want of jurisdiction of the subject matter (or parties) ; (2), want of legal capacity to sue ; (3), another action pending between the same parties for the same cause ; (in Missouri the words "in this state" are added to this assignment) ; (4), defeat of parties plaintiff (or defendant) ; (5), several causes of action improperly joined ; (6), the complainant does not state facts sufficient to constitute a cause of action.

Any or all of these grounds may be assigned when the defects complained of appear on the face of the pleading demurred to.

The Codes of California, Colorado, Missouri and Nevada provide for a seventh ground, while that of Iowa omits the fifth and adds certain special assignments to the sixth. As therefore stated the plaintiff cannot in his complaint propound interrogatories to the defendant and require him to answer them. The defendant must answer fully the allegations of the complaint, however, or they will be taken as true.

The answers must contain: *First*, a general or specific denial of each material allegation of the complaint controverted by the defendant. A

general denial puts in issue the truth of the complaint and the proof is confined to establishing or controverting the allegations of such complaint. A special denial is, as its name indicates, restricted to particular matter and whether or not it raises an issue must depend upon the importance of the matter denied. If the matter put in issue is immaterial the denial may be disregarded. A denial should be direct, unambiguous, not evasive, nor in the form of a negative pregnant. *Second*, a statement of any new matter constituting a defense or counter-claim in ordinary and concise language. Under this provision all affirmative matter of defense of whatever nature must be pleaded so that the advice may be prepared to rebut the same with proof in case such proof is in his possession. It is defensive merely and may diminish or wholly defeat a recovery by the plaintiff. *Third*, the word "counter-claim" is said to be a new term introduced into legal literature by the Code Commissioners.

The counterclaim must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: *First*, a cause of action arising out of a contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action; *Second*, in an action arising on contract any other cause of action arising also on contract and existing at the commencement of the action. In Arkansas, Kansas, Nebraska, and Ohio, the second sub-division is omitted, and in place thereof is a provision for the allowance of set-off.

In some of the early decisions there was some conflict as to the relief which could be granted to a defendant on his counterclaim, and decisions may be found holding it to be the same as recoupment. The rule is now well settled, however, that in an ordinary action, counterclaim includes not only recoupment and a cross-bill under the chancery practice, but the defendant may have any relief in regard to the subject matter of the suit to which he would have been entitled had he brought an original action against the plaintiff.

Under the first sub-division the action and counterclaim may be on contract or tort and the relief demanded may be either legal or equitable, as the nature of the case may require. A counterclaim may be defensive and also ask for affirmative relief, and it is no objection that the damages are unliquidated. Under the second sub-division, the rules relating to set-off generally control. It is the duty of the defendant to set forth in one answer all his defenses of every nature, together with any counterclaim or set-off that he may have. The defenses, however, must be consistent with each other because otherwise they cannot be truthful. The test is, may all be true? Thus a defendant may plead the statute of limitations and also payment of the claim sued on, because both may be true, but he cannot deny the existence of an instrument and claim rights under it. When the controversy is between the plaintiff and defendant, the defendant may have all the relief on his answer to which he is entitled. If, however, there is a

controversy between defendants in regard to the subject-matter of the suit it may be necessary to set forth the facts in a cross-complaint—as where one or more mortgagees are made parties defendant and it is necessary to set out their respective clauses.

The term “cross-complaint” is frequently but improperly used to designate the answer to the plaintiff’s complaint.

There is no uniform rule as to the verification of pleadings. In some Code states all pleadings of fact must be verified. In others it is optional with the plaintiff. In all, however, the oath is merely to act on the conscience of the party and obtain as far as possible a truthful statement of the facts. The verification adds no weight to the pleading itself, and requires no additional evidence to overcome. There is also a provision that “in the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed with a view of substantial justice between the parties.” Also, “the rule of the common law that statutes in derogation of that law are to be strictly construed has no application to this act.” If, however, there is a failure to state a material fact the pleading will not be aided by these provisions.

In a late number of the *American Law Review*, David Dudley Field, with justifiable pride, calls attention to the fact that more than one-half of the states have adopted substantially the New York code; that in 1873 England adopted its essential provisions which were also afterwards adopted by India and many other governments.

In conclusion, I desire to quote the language of Chief Justice Lake in *Wilcox v. Saunders*, 5 Neb. 587: “The code does not profess to abrogate that distinction, which in the very nature of things must always exist between legal and equitable rights and remedies, nor to deprive any person of as complete redress, for every conceivable wrong done to him in his person and estate, as he formerly could have had. But it does require that, whatever the nature of the right to be enforced, or the wrong to be redressed may be, whether such as formerly would have been cognizable in either a court of chancery, or in a court of law, the simple form of a ‘civil action’ must be followed, in which a plain statement of the material facts constituting the cause of action, or the defense, must be set forth in concise language and without repetition. Thus, while the ancient forms of action are now abolished, all the various remedies known to the law still remain, and are administered through the medium of the single ‘civil action’ of the code, quite as certainly and much more speedily than they were under the former practice.”

MECHANIC'S LIEN.

THE POLLS, WIRES AND LAMPS OF AN ELECTRIC LIGHT COMPANY NOT
EXEMPT FROM THE APPLICATION OF THE MECHANIC'S LIEN STATUTE.

THE BADGER LUMBER COMPANY vs. THE MARION WATER SUPPLY, ELE-
CTRIC LIGHT AND POWER COMPANY.

Kansas Supreme Court, June 11, 1892.

First. An electric light and power company owned land on which was a building and machinery for generating electricity, and it has a franchise from a city to use its streets for the erection of poles on which to stretch wires and suspend lamps to furnish light for the people of the city. Poles were purchased from plaintiff, planted in the streets of the city, wires and lamps were placed thereon, and all connected by the electric light wires with the machinery and premises of the company;

Held, That the poles and wires were an appurtenance of the premises of the company, and that the plaintiff was entitled to a lien upon the same for the poles furnished.

Second. An electric light company which has a franchise to occupy the streets of a city with its poles, wires and lamps, and is engaged in furnishing light to the people of the city is not so distinctively public in its nature and operations as to exempt its property from the application of the Mechanics' Lien Statute.

Johnston, J.—The Badger Lumber Company brought this action to recover \$227.50, the value of seventy cedar poles sold by the Lumber Company to the Marion Water Supply, Electric Light and Power Company, which were used to support electric light wires and lamps, and were connected with the plant and property of the defendant, and the plaintiff asked to have the defendant's property and its appurtenances charged with a lien for the same.

The cause was submitted to the court without a jury, upon the following agreed facts:

"It is agreed that the defendant has erected a system of water works and electric light plant and machinery necessary to operate the same on the real estate described in plaintiff's petition, and has put in the proper machinery for furnishing electric light for the city of Marion, and has a franchise from the city to use the streets of the city for the erection of poles and stretching electric light wires thereon through the city, and that the defendant erected its poles and stretched its electric wires on the same over different portions of the city; that the plaintiff furnished poles for stretching the wires for the electric light, and that the defendant used the same in the streets of Marion, and stretched its electric wires upon the same, and hung its lamps thereon, and operated and used the same for the

purpose of furnishing electric light for different portions of the city ; that none of the material furnished by the plaintiff was actually placed upon the grounds mentioned in plaintiff's petition, but that the poles so furnished were all used in the streets of the city of Marion, and were connected with the electric light machinery and water works on defendant's premises by electric light wires used by the defendant for the transmission of electricity from its premises through the city ; that the machinery of the electric light and water works is all located on the same premises, in the same building, and run by the same engine, but the dynamo for generating electricity, and its machinery, is so constructed and arranged that it can be used separate and apart from the water works machinery, and that either the water works or the electric light plant can be operated separately and independently from each other, and have a franchise from the city to lay mains and pipes in the streets of the city, and are operating said system of water works, and furnishing the inhabitants of said city with water by means of said system of water works." The court awarded plaintiff a personal judgment against the defendant for the amount claimed, but refused to enforce a lien upon the real estate and appurtenances of the defendant, for the reason "that no part of the material for which plaintiff claims a lien was on the real estate of the defendant, or attached thereto in any manner except by the wires stretched from the poles of the defendant's electric light machinery situated on the said estate."

The sole question presented here is, do the poles and wires attached to the building and premises of the defendant constitute an appurtenance of the same within the meaning of the Mechanic's Lien Law? The statute, as it existed prior to 1889, when this cause of action arose, provided that "any mechanic or other person who shall, under contract with the owner of any tract or piece of land, * * * perform labor or furnish material for erecting, altering or repairing any building or the appurtenance of any building, or any erection or improvement, or shall furnish or perform labor in the putting up of any fixture in or attachment to any such building or improvement, * * * or shall build a stone fence or shall perform labor or furnish material for erecting, altering or repairing any fence or any tract or piece of land, shall have a lien upon the whole piece or tract of land, the buildings and appurtenances, in the manner herein provided," etc.

As will be seen, the statute gives a lien for material furnished for a building or its appurtenances, and the same is chargeable upon the land, building and appurtenances. If the poles and wires can be regarded as an appurtenance of the power-house, the plaintiff acquired a lien and is entitled to enforce it against the property of the defendant. What, then, is an appurtenance? Bouvier's definition is : "Things belonging to another thing as principal, and which pass as incident to the principal thing. * * * Thus if a house and lot be conveyed, everything passes which is necessary to the full enjoyment thereof and which is in use as incident or appurtenant thereto."

"The grant of a thing will include whatever the grantor had power to convey which is reasonably necessary to the enjoyment of the thing granted. Thus the grant of a house with appurtenances passes a conduit by which water is conducted to it." 2 Washburn Real Property, 3 ed., 419; *Farmer vs. Water Co.*, 56 Cal., 11; *Meek vs. Breckinridge*, 29 O. St., 642; 1 *Am. and Eng. Ency. of L.*, 641. Here the principal thing was the power-house, and the poles and wires attached thereto were an incident to the power-house and machinery. They were necessary to the enjoyment of the principal thing and indispensable in the transmission of electricity and the lighting of the city. If a conveyance of the property of the company, with the appurtenances belonging, had been made by the defendants, we do not doubt that the poles and wires would have passed as appurtenant to the premises conveyed. The fact that the poles were planted in the streets of the city, the fee of which is in the public, will not change their character or make them any the less an appurtenance to the premises of the electric light company. The city had granted the company a franchise to plant their poles upon the streets, and hence they were rightfully there and there can be no question that they were owned by the electric light company. In *Redlon vs. Barker*, 4 Kas., 445, it was held that a hotel sign, attached to a post planted in the street of a city, seven or eight feet from the front of the hotel, and placed there as a permanent sign, was an appurtenance to the hotel; and where the hotel and premises were conveyed with the appurtenances without reservation, such conveyance carried the sign and post. It was there urged that as the owner of the hotel did not have the fee of the street on which the post and sign were standing, they could not be regarded as appurtenances to the premises; but it was held that as the sign and post were rightfully in the street, and necessary for the uses and purposes of the building to which they were incident, they remained the property of the owner of the hotel, and when he conveyed the hotel premises he parted with his title to the sign and post.

In *Beatty v. Barker*, 141 Mass., 523, the plaintiff undertook to enforce a mechanic's lien for a drain-pipe from the cellar of a house, through the cellar-wall, front yard, and out into the street, to a connection with the sewer. The house was built upon a street of the city, and the piping inside of the house and outside of it to the sewer was necessary to the use of the house, and was included in the contract for building it. It extended 27 feet beyond the street line, and the fee of the street was not in the owner of the house. The court ruled that the contractor was entitled to a lien for the piping, and stated that "it is immaterial whether it was inside or outside the walls of the house, or whether it was above ground or under ground, or whether it extended one foot or thirty feet. It is immaterial also whether the fee of the land in the street was or was not in the owner of the lot. It must be assumed that the pipe was rightfully laid to the sewer, even if the fee of the street was not in the respondent. The pipe did not become the property of the owner of the fee of the street, but

belonged to the owner of the house, and he had an interest in the soil of the street to sustain his pipe, which would pass by a deed of the lot." See, also, *Philbrick v. Ewing*, 97 Mass., 134; *Factory v. Batchelder*, 3 N. H., 190; *Carpenter v. Leonard*, 5 Minn., 155; *Milling Co., v. Remick*, 1 Ore., 169; *Pullis v. Huffman*, 28 Mo. Ap., 666; *McDermott v. Palmer*, 8 N. Y., 387; *Amis v. Louisa*, 9 Mo., 621; Phillips on Mechanic's Liens, Sec. 202; Kneeland on Mechanic's Liens, Sec. 83.

The defendant in error principally relies upon *Parmelee v. Hambleton*, 19 Ill., 615, to defeat the lien and sustain the judgment that was rendered. The court there held that a person who performed labor upon a vault under a sidewalk adjacent to a building, was not entitled to a lien. The vault is there held to be an appurtenance to the building, but as the appurtenance was in the street and not upon the lot on which the building stood, the lien was denied. The case is not an authority here, and is based upon an Illinois statute which provides that both the building and appurtenance shall be upon the lot sought to be subjected to the lien. Our statute does not require that the appurtenance shall be upon the land, but authorizes a lien where the structure or improvement is appurtenant to the land or building. While the lien rests upon a statute and the remedy must be confined within the terms of the statute, yet such provisions are to receive a liberal construction in the interests of justice, and we think the term, "appurtenances," as used in the statute, fairly includes the poles and wires attached to the premises of the defendant, and that the plaintiff is entitled to the lien which he claimed.

Our attention is called to another question, which is fairly in the record, viz: Is the property of an electric light company having a franchise from the city to occupy its streets in the transmission of light to the inhabitants of the city subject to a mechanic's lien? It is contended that this corporation, like a railroad company, is an instrumentality of the public, authorized and established for the convenience and benefit of the public, and that on the grounds of public policy and necessity its operation should not be disturbed or its property subjected to a lien at the instance of a laborer or material man, who has contributed to the building of its plant. If it were conceded that the railroad company and the electric light company are to be placed in the same class of corporations, we would still think that there was no public policy nor necessity which required an exemption of their property from liability to the ordinary process of law or to a mechanic's lien. The general rule is that the public property of a municipal corporation is not subject to seizure and sale, and it is generally held that a mechanic's lien cannot be enforced against property which is not subject to sale on execution. The reason for this exemption is that such corporations are instrumentalities of the government itself, and the seizure and sale of the public property would interrupt and suspend the functions of government, and also that other provisions have been made by law for the collection and payment of public obligations. Corpora-

tions, however, such as the one claiming exemption here, although they serve the public convenience to some extent, are not organized merely for public advantage, but are operated largely for the private benefit of the incorporators. In this state, such corporations may mortgage or sell their property, and the general rule is that property of a corporation which may be sold under a mortgage or specific lien given by the owner, may be subjected to a mechanic's lien. If a corporation may by its voluntary act in creating a specific lien subject its property to seizure and sale, it is difficult to find any substantial objection to allowing and enforcing the claim of a laborer or material man against the same property under the mechanic's lien law. In some of the states, notably Pennsylvania, (*Foster v. Fowler*, 60 Pa. St., 27; *Guest v. Water Co.*, 21 Atl. Rep., 1001. See, also, *Graham v. Coal Road Co.*, 14 Bush, (Ky.), 425;) it has been held under their statutes that a mechanic's lien will not attach to the property of quasi public corporations. But our statute does not in terms or by implication warrant any such exemption. The language of the statute is broad and comprehensive and contains no suggestion of any exemption, such as is claimed here. Under the terms of this statute it has been held that a lien may be secured on a public school house erected by a school district. (*Wilson v. School District*, 17 Kas., 104; *School District v. Conrad*, 17 Kas., 522.) Although some of the authorities favor the exemption, because a judicial sale or the enforcement of a mechanic's lien would impair the usefulness of such corporations and occasions public inconvenience, yet it has been well said that "the evil of withdrawing a vast and constantly increasing amount of the wealth of the country from the reach of creditors has been regarded as so real and serious, that the courts have not given it their countenance or support, and at the present day the property of corporations other than municipal, though essential to the enjoyment of the corporate franchises, is almost universally treated as subject to execution." I. Freeman on Executions, Sec. 126. See, also, *Hill v. Rld. Co.*, 11 Wis., 214; *Rld. Co. v. Gilmore*, 37 N. H., 410; *Platt v. Rld. Co.*, 26 Conn., 544; *Coe v. Peacock*, 14 O. St., 187; *Lathrop v. Middleton*, 23 Cal., 257; *State v. Rives*, 5 Ired., 307; *Board of Ed. v. Greenebaum*, 39 Ill., 609; *Arthur v. Bank*, 17 Miss., 394; *Storage Co. v. Southwark*, 125 Pa. St., 248; *Phillips on Mechanic's Liens*, Sec. 182.

The judgment of the district court will be reversed and cause remanded with instructions to enter judgment in favor of the plaintiff. All the justices concurring.

Note.—The principal case, in view of the statute of Kansas, is well supported by reason and authority. In *Kershaw v. Fitzpatrick*, 3 Mo. App., 575, it was held: "That a mechanic's lien does not attach for the laying of a lead pipe two hundred and fifty feet in length under a public street, for the purpose of connecting a bathroom in the building with a water main in the city." In a general way, the reasoning of the court was

that such a connection is not essential to the use of the building as a residence. I do not think that case was well decided.

In *Pullis v. Hoffman*, 28 Mo. App., 666; it was decided that the statute gave a lien for the illuminating tile which went into the front door, in the rear of the front sill, and also extended from the south line of the building about four feet into the side-walk. There was also evidence tending to show that the portion of the illuminating tiling which was extended into the side-walk, was so extended under a license from the city, embodied in one of its ordinances, and that it furnished a covering for that part of the cellar of the building, which, under such license from the city, extended southwardly under the side-walk beyond the line of the building." In *Gerard v. Birch*, 28 N. J. Eq., 317, extensive and costly green-houses upon the lot partially occupied by the dwelling-house, were held as appurtenances to the house, and that the mechanic's lien had operated thereon. In *Derrickson v. Edwards*, 29 N. J. Law, 468, a flume constructed of wood, and from sixty to one hundred feet long, running from a pond or race-way into the mill and used for the purpose of conveying water upon the wheel within the mill, was held to be subject to a mechanic's lien.

In *Foster v. Fowler*, 60 Pa. St., 27; the Monongahela Water Company was the garnishee. The Chief Justice, in that case said: "Regarding the corporation of the Monongahela Water Company, therefore, as a public corporation, it stands on the principles announced in *Ammant v. The Turnpike Co.*, 13 S. & R., 210; *The Turnpike Co. v. Wallace*, 8 Watts, 316; and *The Susquehanna Canal Co. v. Bonham*, 3 W. & S., 27. In this last case, Sergeant, J., said: "The privileges granted to corporations to construct turnpike roads, canals, etc., are conferred with a view to the public use and accommodation, and they cannot voluntarily deprive themselves of the lands and real estate, and franchises which are necessary for that purpose; nor can they be taken from them by execution and sold by a creditor, because to permit it would defeat the whole object of the charter, by taking the improvements out of the hands of the corporation and destroying their use and benefit."

In *Guest v. Lower Marion Water Co.*, (Supreme Court of Penn., May 27, 1891,) 21 Atl. Rep., 1001, the court held the property of the water company exempt from mechanic's liens. In Pennsylvania, debts against public corporations must be recovered by sequestration. In *Graham v. Mt. Sterling Coalroad Co.*, Vol. 14 Bush (Ky.), 425, it was decided that the mechanic's lien law does not apply to, and cannot be enforced against bridges, culverts, trestle-works, etc., of a railroad company, upon the ground that it would be ruinous to the public interest.

In *Dunn v. North Mo. Railroad Co.*, 24 Mo., 493; under the statute of Missouri, where work and labor are performed upon, or materials furnished for the construction of bridges and culverts upon the line of a public railroad, authorized by an act of the state legislature, no lien upon the bridges and culvert is conferred upon the material man or laborer."

Topeka, Kansas.

ALBERT H. HORTON.

CAPITAL PUNISHMENT.

JEROME W. TURNER, ESQ.

In every discussion respecting capital punishment, we are understood to use the phrase as applied to the penalty for murder. We desire to say just here, that wilful and deliberate killing is not nearly so common as some of our willing statisticians would make it. With them, as with the people generally, all killing is recorded as murder. The percentages of the capital crime, are not therefore correct. They are made from first intelligence, and sensational reports, and not as the result of inquests or trials. They are therefore absolutely incorrect, and are no basis whatever for an argument in favor of a mode of punishment which has nothing to recommend it, but an alleged deterrent quality.

But these statistics are equally unreliable if the record-makers await the result of inquests or even verdicts. Juries, even under "the charge" of the best judges, make poor work of fixing the degrees of crime. I have in mind a case, in which I was engaged as counsel, in which the respondent was charged with murder, and the facts were that he went up deliberately, behind his victim and shot him in the back of the head. The jury brought in a verdict of manslaughter. There is therefore scarcely an approximate knowledge of the percentage of murders in any commonwealth. This much we see in the outset without entering upon that grave question "should life, under any circumstances, be made to depend upon criminal proceedings?"

The argument must, therefore, of necessity proceed—not from data or facts establishing its claim—but upon the assumption that "capital punishment" operates upon cautionary intelligence and therefore must tend to a lessening of crime. But the facts are better than any bridge of assumption, projected from bases of fact, which cannot be ascertained. We must have something more than the logician's *ergo*.

If men are deterred by the fear of "capital punishment," it must evidently be before the murderous purpose is fixed and mature. The fate that follows conviction is never considered after that. It must operate to prevent the intention and the resolution to kill. But the overshadowing thought of a man anxious to perpetrate felonious homicide, is the evasion of detection. If he thinks he can so execute his plan as to avoid discovery, no thought whatever influences him of any kind of punishment. Absolute secresy is absolute safety, and all thought of penalty is excluded. It is worth repeating, that the first idea with any reasonable creature, is to avoid detection without reference to the penalty, and when he thinks he has so

developed his place, he acts absolutely without any reference to degrees or kinds of punishment. These have no effect whatever upon his purpose. It does not weigh so much as a sprig of heather. He will hide the corpse under the leaves, and be safe. He does not remember that there is a law of discovery in the universe. He has not learned that there is a constant movement from the closet to the house-top. He does not reflect that as in Hood's version of Eugene Aram, the wind will blow the leaves away, or that if he sinks the body in the stream, it will run dry! Walled in with seeming security, he does not care to inquire whether you hang or imprison. He does not say to himself, as some of our destructives assert, "Oh, well, if I do get caught, it will only be imprisonment for life." Few men commit murder who, at the moment, harbor even the possibility of being overtaken. The thought of crime clothes one with fancied security. The deadly desire is father to the thought that excludes all deterrent effect. His mind is willing to see everything favorable to the execution of the criminal purpose. How much room think you is there in such a mind for the thought of punishment? Imagine a man who would like to kill another, sitting down and balancing the relative gravity of hanging or imprisonment, and ending all by giving up the formation of the purpose, because of capital punishment, or nursing and maturing it because of imprisonment for life!

Publicity, notoriety and probable detection, are the deterrents from crime. The electric lights in the stores and banks, are worth more than all vindictory statutes on the subject of burglary. The law lies *perdue*, in the book. The business place is ablaze with light. The fear of the court does not reach the criminal classes. It is the burglar alarm, or the "hue and cry," that blanches their faces. It is darkness, or its equivalent, *unseenness*, in which the eggs of crime are hatched. There the law is not given a thought. But, turn the eye of day on the scene, and the law with its provision for punishment is read in all its fearful import, not because it is the law, but because the conditions lead to seeing it. It is the condition, and not the law that invites or deters. So much for the alleged deterrent quality of "capital punishment."

In the discussion of this matter there can be no contest about the value of life, for fortunately those who insist upon the penalty of taking it, claim that they have more regard for the worth of it than anybody else. And so it seems to us that in our further consideration of the question, we need only to lay down this proposition, that the wilful destruction of it is a *malum in se*, and a *crime against nature*! That is the major premise of an unanswerable syllogism. The syllogism is this, first, it is wrong for one man to wilfully and deliberately kill another. Second, it is wrong for any number of men in combination to wilfully and deliberately kill their fellow. Third, therefore, the State—which indeed is a combination and organization of men—is guilty in the wilful and deliberate taking of life!

The crime is an argument against the punishment. The indicter is indicted. The gallows is a mute plea for the offense it punishes. It kills and encourages killing!

Would it not be much better to have a punishment that would be an argument against the crime. Many men do not see the awful inconsistency of providing a penalty of the same character as the offense it punishes, because it answers to the law of retaliation, that appeals to that beastly instinct of the tiger, which we have not yet outgrown. This is the sole instance where the criminal is visited by authority with the same crime he is charged with. Would it not be quite as well to condemn the thief to have his goods stolen by some government agent? Why not commission the thief as well as the hangman? Would it not be wise to punish the burglar by ordering the breaking of his house in the night? Will it not be better to punish arson, by sending the constable to the prisoner's house with a torch? Will it not decrease robbery, if the judge orders the officer to knock down the accused and spoil him of his goods? Shall there not be rape for rape, as well as in the old Greek tragedy, "blood for blood, and blow for blow?" "Hanging is not murder" say some. But tried by all legal and moral canons, it is. Where the killing is predetermined and deliberate, the motive cannot be considered. And killing is the end of the execution. The sentence of the judge makes the taking of the life a friality, and not its example upon society. Not all the statutes of all the legislatures can change the character of the transaction. Is not the executioner a detested agent? All men and women shun him. He keeps his name and identity a secret, like any other slayer of his kind!

There is this further thought: No plea for taking human life will avail the prisoner, but the imperiousness of real or apparent necessity. No private individual will be excused for taking life, unless he has good reason to believe that he can in no other way save his own. Nay, the State, in the exercise of its right of "Eminent domain," cannot even take private property except upon the plea of "necessity." But the same State takes life, under the system of "Capital Punishment," for less reason. The culprit is not hung because the life of the body politic is in danger, but simply because it believes that it will in some unknown degree reduce the percentage of capital crime. The people cannot destroy a dam without alleging and proving a necessity, but they can lay their hand upon a man made in the image of God, and send him unshrifed into eternity without assignning any reason except that he himself killed another man. Shall the law exercise more power over a human being than it does over an out house? Is my brother of less import than my acre?

But this senseless terrorism defeats itself. Angele in "Measure for Measure," says:

"We must not make a scarecrow of the law—
 "Setting it up to *fear* the birds of prey,
 "And let it keep one perch—till custom make it
 "Their *perch*, and not their *terror*!"

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE, *Treasurer*,
ELI R. SUTTON,

H. D. JEWELL,
J. E. ROBERTS.

OFFICIAL PUBLICATION MICHIGAN STATE BAR ASSOCIATION.

Published monthly, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

Address all correspondence to MICHIGAN LAW JOURNAL, Grand Rapids, Mich.

ONE of our exchanges puts a very pointed query, when it asks why the State should not re-imburse innocent men who have been convicted of crime and suffered as a consequence of judicial error. In several European nations the system of reparation for judicial errors has been established and found to operate beneficially, and there seems to be no reason why it should not exist in the United States. It is a subject that can be discussed profitably in legal journals.

HONORABLE ALBERT H. HORTON, Chief Justice of the Supreme Court of Kansas, contributes, in this number, a valuable note to the case of *The Badger Lumber Company v. The Marion Water Supply, Electric Light and Power Company*. This case was decided by the Kansas Supreme Court, the opinion being by Judge Johnston, one of Judge Horton's colleagues. The case is an interesting one, and is a new addition to the rapidly accumulating volume of electrical law. It decides two things. In substance the first is that the poles, wires and lamps of an electric light plant, beginning at the power house and extending throughout the city, are appurtenances to the power house within the mechanic's lien law of Kansas. The second point is that an electric light company, furnishing light to the municipal corporation for the lighting of the streets, and also to individuals for the lighting of dwellings, factories, etc., is not such a public corporation that, like the railroad, its property is exempt from the mechanic's lien law under the Kansas statute.

WE NOTICE the following in the *American Law Review* for July and August. "There is no reason why the Wisconsin Law School should not become the favorite law school of the future, as the Michigan Law School has been of the past." We must confess that we were somewhat taken aback when we read this sentence, and while we do not wish the law school of our Badger neighbors anything but the increased prosperity which its careful and thorough management amply deserves, yet we desire to most

emphatically impress upon the attention of our revered contemporary of St. Louis, the fact that the law school of the University of Michigan, instead of being a thing of the dead past, is a live and vigorous thing of the present. It has a rich and glorious past, it is true, but the history of that past is but a strong guarantee that its future will be as conspicuously brilliant. The growth of the Michigan Law School has been phenomenal. Its popularity is not ephemeral, either, for it is due to causes as permanent and lasting as the rocks. Its management has always been able and conservative, and its teachings have always been thorough. Many a learned jurist of the land will with marked pleasure recall the valued instruction imparted by those venerated and hallowed teachers, Cooley, Walker, Campbell and Kent. But in the opinion of the student of to-day, although he regards with reverence the memory of the early instructors, the present faculty of the school contains intellects and teaching ability second to none in the country. Wells, Griffin, Thompson, Knowlton, Champlin, Brown and Conely will be names as illustrious in the future as Cooley, Walker, Campbell and Kent are now. There were 664 students registered in the department last collegiate year, a pronounced increase over the year before, being more than twice as many as there were enrolled at the Harvard Law School, the nearest in point of numbers. A beautiful and commodious addition to the law building has just been completed and everything points to present prosperity and future promise. There is no reason to suppose the Law School of the University of Michigan will yield the palm, in the immediate future, as the most popular law school in the land, to any of its younger competitors, but, at the same time, it has only the most hearty wishes for the success of every institution which is, like itself, engaged in instructing and developing the minds of those who aspire to positions of honor in the ranks of the noble profession of the law.

MORE MEMBERS FOR THE STATE BAR ASSOCIATION.—An effort will soon be made by the officers of the Michigan State Bar Association to increase the membership of the association. Each lawyer in the state, in active practice, should ally himself with the organization. There is no reason, it seems to us, why the association should not include in its membership all of the supreme, circuit and probate judges in the state, and those lawyers and judges who have retired from active work as well. In fact, it is probable that those who have retired are better equipped and better able to advance the objects of the association than those who are busily engaged in their legal work. For example, how valuable and interesting would be the words of counsel and advice which Michigan's venerated jurist, Judge Cooley, would be able to give the association. These men should be invited to join the organization. There is a vast field of work and reform in which the State Bar Association can demonstrate its usefulness, but it cannot do this work, its recommendations will come with no force and be of no effect unless they are backed and endorsed by the united bar of the State. It is earnestly desired that every attorney in the State, who is not already a member of the State Bar Association, send in his name to the Secretary, Ralph Stone, Grand Rapids, for enrollment, and those who are already members can assist the officers by urging those in their own localities, who are not members, to join at once. There is an important work to be done at Lansing on the third Tuesday in January, and it is of the highest importance that the association which carries recommendations of measures for the relief of the Supreme Court

before the Legislature, be a state bar association in fact as well as in name. The Association has on its rolls at present only 257 attorneys. Detroit heads the list with 94. Grand Rapids, a city, one-third the size of the first city of the state, shows that it is fully alive to the importance of the organization by contributing 86 members, only eight behind Detroit. Some of the other cities and towns represented on the Secretary's books are: Kalamazoo, 14; Marquette, 10; Ann Arbor, 8; Lansing, 5; Saginaw, 5; Muskegon, 4; Bay City, 4; and Lansing, 4. Saginaw has a County Bar Association. Why does it not ally itself with the State Bar Association? The cities of Alpena, Battle Creek, Bay City, Ishpeming, Jackson, Lansing, Manistee, Menominee, Muskegon and St. Clair, all above 10,000 population, should be more numerous represented in the Association.

IN THE case of *Vanderbank v. Schmidt*, decided by the Louisiana Supreme Court, an excellent definition of "good-will," deduced from a number of cases and text-books, is given. The dispute involved the right to the use of the name "Hotel Vanderbank." The plaintiff, the original owner of the hotel bearing his name, petitioned the court to enjoin the further use of his name, claiming damages. Vanderbank owned and operated a hotel and a restaurant, both bearing his name. When he sold the hotel, the purchaser continued the use of his name and Vanderbank claimed that his business, as proprietor of the restaurant, was injured thereby. The ground on which the defendant resists the plaintiff's demands is that by his purchase he acquired all the right, title and interest of the vendor in and to the Hotel Vanderbank, including the good-will of the business and establishment, and particularly such good-will as the vendor acquired from the plaintiff, including the name or style of said hotel, which he has purchased and is of right entitled to use and enjoy.

The definition of good-will which the court gives is as follows. "From the foregoing it appears that good-will is an advantage or benefit which is acquired by a business establishment beyond the mere intrinsic value of the capital stock; that it is the general public patronage and encouragement which a business receives from its customers on account of its local position; that it is the subject of value and price, and of bargain and sale, though intangible, but in order to be conveyed mention must be made of it in the act of sale." The court concludes that "on reason and authority the case is with the plaintiff; that the name given to a building in which an hotel is kept, which contains the name of the proprietor, does not constitute an element of good-will though it may tend to enhance the business reputation of the place or situs of the business establishment, which is an ingredient of good-will; that while under the authorities such a name is a marketable article and a proper subject of sale, yet it must be expressly understood in the act of sale, and if no consideration be paid, same may be subsequently recalled. * * * It is therefore ordered and decreed that there be judgment in plaintiff's favor and against the defendant, perpetually enjoining and restraining the latter from using or employing the name 'Hotel Vanderbank' as the name or style of an hotel or restaurant at the former site of such an establishment as that kept and operated by the plaintiff."

THE CODE OF CIVIL PROCEDURE.—The article in this number, by the Honorable Samuel Maxwell, Chief Justice of the Supreme Court of Nebraska, upon "Leading Features of the Code of Civil Procedure," is a valu-

able contribution to the literature of this subject. The adoption of a code of civil procedure in Michigan is now being considerably discussed by the lawyers of the state. Justice Maxwell is thoroughly competent to express an opinion as to the practicability and usefulness of the Code, and whatever he writes will be read with particular interest by the Bar of this state. He is lecturer upon code pleading and practice in the University of Michigan Law School, and his article, being instructive in character, will be of practical benefit to the students of that school.

The advocates of the Code in this country have not had a smooth path to tread. They have found the legal profession slow to appreciate the advantages which they allege will result from the simplicity in pleading which the Code is said to introduce. American lawyers are, as a whole, conservative. Innovations are received by them with suspicion. When they do act, they act slowly, and consequently their recommendations can be adopted with safety. Those who are urging the adoption of the Code have met with only a fair degree of success, for their opponents are strong, determined, and able lawyers.

Professor Samuel Tyler, of the Columbian Law School, Washington, expresses his opinion of the Code in the following caustic words: "The love of innovation induced the State of New York, some years ago, to abrogate common law pleading, and introduce a code of procedure for the regulation of litigation in her courts; and notwithstanding the lamentable confusion and uncertainty, and the greatly increased expense which has thereby been brought into the administration of justice in that State, other States have followed in her track of barbaric empiricism." Mr. David Dudley Field, the eminent New York lawyer, who is regarded as the national champion of the Code, would probably take exception to Professor Tyler's statement. It is possible that the latter's poor opinion of the Code is traceable to the fact that he is the author of the "Maryland Simplified Pleading," which is constructed upon the theory that common law pleading should be simplified, but not abolished. Hon. J. Logan Chipman, of this state, in his address before the meeting of the Michigan State Bar Association last year, while eulogizing the common law expressed himself as follows: "He (the lawyer) should know these things, in order that he may face and properly combat and overthrow the people who seek to change our robust freedom for the policy of the civil law, and to supplant our present sensible laws by codes suddenly invented, entangling us in the maze of new reports which no man can see how we shall ever get out of." Associate Justice Robert C. Grier, who was upon the United States Supreme Bench from 1846 to 1870, is even more emphatic in his denunciation of the Code. He says: "This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sociologists, who invent new codes and systems of pleading to order. But this attempt to abolish species and establish a single genus is found to be beyond the power of legislative omnipotence. The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and to introduce in the record an endless wrangle in writing, perplexing the court, delaying and impeding the administration of justice."

Our own Judge Cooley, with the even temperament which has always characterized his judicial utterances in a marked degree, strikes a middle course, and intimates that while the Code system has much in it that is admirable, yet it is not altogether wise to break away suddenly or com-

pletely from the system under which English law has been evolved. He says : "After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in a logical manner, after the rules laid down by Stephen and Gould, is better prepared to draw a pleading under the Code which will stand the test on demurrer than the man who, without that training, undertakes to tell his story to court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little, or of presenting the facts so inaccurately, as to leave his rights in doubt on his own showing."

It is quite probable that the Bar of Michigan, at no distant time, will be called upon to endorse a system of code pleading. An effort will undoubtedly be made by its advocates to have it introduced in this state. The subject will be discussed at the meetings of the State Bar Association, and before that body gives it its endorsement, it will be necessary for the members to be prepared to consider it intelligently and rationally. In framing a satisfactory system of procedure it will be wise to give due consideration to all that both the most conservative and the most radical have to say, for it must be remembered that, "The whole truth is made up of the partial truths contained in two opposite propositions." Those who have the courage to advocate radical departures from firmly established systems are deserving only of praise and commendation. "The world is full of those who are rooted in sectarianism, fearful of any change, effeminate shrinkers from the smallest suffering, morbidly afraid of public opinion and more than anxious to do whatever that opinion expects of them. To enter paths in which there are no precedents is the boldest of experiments. Such men are more heroic than those who die for their convictions."

LATE DECISIONS OF THE MICHIGAN SUPREME COURT.

PEOPLE V. HANDLEY.—*July 28.*—(Morse, C. J.)

Arson under Statute—Information—Proof of Crime under Different Statutes.—Under an information charging a person with arson under §9123 How. Stat., a conviction can not be had upon proof of an offence under §9127, and a verdict so rendered will be set aside and an acquittal granted.

ANDERSON V. CORCORAN.—*July 28.*—(Grant, J.)

Pleading—Recovery under Common Counts for Money Had and Received—Recovery for the violation of a contract of bailment cannot be had under the common courts of assumpsit for money had and received. Under such a declaration plaintiff can recover for moneys received by defendant upon sales made, cannot recover upon the theory that defendant has sold them at a price less than the one agreed upon between them.

LOSER V. SOLDIERS' HOME.—*July 28.*—(Grant, J.)

Pensions of Inmates of Soldier's Home.—A rule adopted by the management of the Michigan Soldier's Home requiring inmates to pay to the Commandant all pension money received above the sum of five dollars per month, to be held subject to disposal of the Board of Managers of the Home, is not in contravention of the statute forbidding the assignment of pensions, and mandamus compelling such rule to be recalled will not be granted.

BETTS V. READING.—*July 28.*—(Morse, C. J.)

City Ordinance—Right to Recover License Fees Paid under an Illegal Ordinance.—Where a man pays, without protest or threats of prosecution from city authorities, a license fee under an ordinance which is void, such money cannot be recovered from the city on the ground that it was paid without consideration and under duress. *Cribbs v. Sowle*, 87 Mich. 340, distinguished. *Bank v. Watkins*, 21 Mich. 483; *Nickodemus v. East Saginaw*, 25 Mich. 453, and *Detroit v. Martin*, 34 Mich. 170, followed.

PITT V. EMMONS.—*July 28.*—(Montgomery, J.)

Sales—Sales by Samples—Questions for the Jury.—Where a sale of wheat is effected by sample and telegram, and an action is brought for breach of contract it is error for the court to instruct the jury that the plaintiffs could not have supposed when they received defendant's telegram offering to sell at 86½, that defendant intended to undersell the market 10 cents, and held that it would be conclusively presumed that the telegrams referred to the sample of the lower grades. This was a question for the jury.

BOSTON V. HENDERSON.—*July 28.*—(McGrath, J.)

Master and Servant—Damages—Measure of Damages for Loss Caused by Delay of Employer.—Where a contractor is delayed for an unreasonable length of time by his employer, in an action brought to recover damages the measure of damages is not the value of the use of the tools or idle machinery, unless that idleness is enforced by the act complained of. The value of the use of machinery involves profit, but a party is not entitled to profits, in an action for damages, unless the act complained of has deprived him of an opportunity to earn them.

GIRARD V. CITY OF KALAMAZOO.—*July 28.*—(McGrath, J.)

Evidence—Injuries caused by Defective Sidewalks—Relevancy of Testimony—Cross-examination.—In an action against a city to recover damages for personal injuries by falling upon a defective sidewalk, testimony of plaintiff's daughter, who

attended her, as to complaints made during her suffering, but some time after the injury, is competent. It is not admissible to ask witnesses "whether the walk was in a condition of reasonable repair and reasonably safe for public travel," but the facts relative to the condition of the walk should be laid before the jury. In cross-examination a witness may be questioned as to his testimony in a former trial if such testimony is relevant to the issue. By consenting to the use of testimony taken pending trial, out of court, any objection to the ruling of the court allowing it to be taken is waived.

HIGHSTONE v. FRANKS.—July 28.—(Long, J.)

Limitation of Actions—Effect of Acknowledgment of Mortgage Debt—Pleading—Under Act No. 204, Laws of 1879, (How. Stat., § 8907), actions on mortgages brought after they have been due 15 years, or 15 years since last payment was made, or if due 15 years before the passage of this act, then not within five years after the passage of the act, are barred; and an assignment of the mortgage and an acknowledgment that the mortgage is still alive before it is barred, will not take it out of the statute. (*Wallace v. Finnegan*, 14 Mich., 170, and *Blair v. Carpenter* 75 Mich., 167, distinguished.) The question of limitation of the action may be raised either by demurrer or by answer.

OUR EXCHANGES.

After eight months existence in the field of legal journalism, and before we approach any nearer to the end of our first volume, it is appropriate for us to give a little public notice of our exchanges and acknowledge several little courtesies received from many of them:

THE most frequent visitor to our table is the *New York Law Journal*, the only daily law journal published in this country. We look for its coming every day, and every day brings new and interesting reading. The editorial page usually contains notes of very recent and important cases, but often very terse articles upon interesting and knotty legal problems are given. The first page contains reports in full of the more important decisions of the New York courts, with full and convenient headings. It must be of special interest to New York city lawyers, as it contains full reports of court transactions and general news in and about the courts. One great advantage it has is, that it has been made the official organ of the city and county for the purpose of publishing the court calendars, judicial proceedings and all legal notices required to be published. This plan is a most feasible one and should be followed in all places where the business of the courts is at all extensive. The publication of all notices of legal proceedings, and other notices required by law to be published might far better be published in one paper, recognized as the paper for that purpose, than to be sandwiched in between patent medicine advertisements in out-of-the-way places in promiscuous publications of the county, or bailiwick, in which the court sits.

THAT well-known bi-monthly, the *American Law Review*, though it does not come nearly as often, is always as welcome, and is really a valuable addition to our files. During the present year its numbers have contained articles of great merit and practical value to the profession. Much care is evidently used in the selection of the matter it publishes. It numbers among its contributors not only talented members of the bar of this country, but well-known barristers across the ocean. Under the simple heading, "Notes," a vast amount of interesting reading is given, which can also be said of the notes of recent decisions. Judge Thompson, its genial and talented editor, has always taken a sort of fatherly interest in the MICHIGAN LAW JOURNAL. He was afraid that our list of contributors, which we sent out before our first issue, was a "dress-parade of names," but we assured him that the list was *bona fide* and that we expected articles from every one of them (many of whom have already contributed to our past numbers). It was in deference to his superior wisdom and good taste that we decided to issue the LAW JOURNAL with the edges trimmed hereafter.

THE *Law Journal* (London) is the only foreign publication that has yet offered to exchange with us. We doubt whether another English legal

publication would be of very much use to us as this one covers the ground so thoroughly. It is a very readable magazine and, as our readers know, we have had occasion to quote it frequently.

THE *Chicago Legal News* has just completed Vol. 24, and sent out with its last number a very complete and comprehensive index of that volume. Great care is evidently taken in the selection of the cases it publishes. It must be of great practical value to the lawyers of Illinois, as it contains the head notes to all important cases from the courts of that state in advance of their publication in the official report. One remarkable thing about the *Legal News* is that it is edited by a woman. (We hope its gifted editor will take no exceptions to the use of that word "remarkable"). We used to have some grave doubts as to the advisability of ladies entering the legal profession but we are not quite as pronounced in our views as we used to be. The co-educational principles of the University of Michigan extend to its Law Department. After seeing ladies and gentlemen associated as class-mates in that institution and observing the result we are not prepared to question the wisdom of the plan. In the class graduating in June last numbering two hundred and ninety, there was but one lady, yet she was as highly respected when she completed as when she entered upon the course, and stood as high in social and college circles as the students of her sex who were pursuing literary studies. Mrs. Bradwell's publication is one of our most valued exchanges, and is an example of what woman can do.

THE *Legal Adviser* is the contemporary of the *Legal News* in Chicago. It is not quite as pretentious as the latter, although it is nearly nine years older. Nevertheless it contains articles of exceptional interest and very spicy little paragraphs. Both these papers are well supported by advertisers, and both contain various legal notices. In this respect they seem to occupy a position in Chicago similar to that filled by the *New York Law Journal* in the metropolis.

THE *Albany Law Journal* is another "old timer." It publishes two volumes a year and is now well into its forty-sixth volume. We always turn first to its "Current Topics." This department is one of the distinguishing features of the *Albany*. It sometimes goes a little outside of the beaten path trodden by legal publications in this column, but it always says something interesting and is not afraid to express its views. The notes of cases are very interesting and considerable discretion seems to be used in the decisions it abstracts. Several interesting cases are reported in full, in each number, but no notes are given to them. It does not publish headed articles regularly, but those it does publish are always good ones. We could not get along without it.

THE *Central Law Journal* generally reaches us in the same mail with the *Albany*. We are sometimes at a loss to know which to open first. We always look for the coming of both. The *Central* devotes more space to its notes of recent decisions and frequently quotes the more important parts of them. Every number contains an article which is usually upon some technical legal subject, and of special interest to the profession. It only publishes one case in full, as a rule, but always adds copious and

valuable notes. The weekly digest of all the current decisions of all the courts is a feature of the *Central* which greatly enhances its value and which the busy lawyer must certainly appreciate.

WE OUGHT not to go further without saying something of the *Green Bag*. It used to call itself a "useless but entertaining magazine for lawyers." But its many readers assured it of the utter inappropriateness of that name so often that it left off the word "useless" and still continues to be an "entertaining magazine for lawyers," which it certainly is, in every sense of the word. It occupies a rather unique position but fills its place well. In typographical appearance we must all admit that it far excels any of us. Its excellent portraits and illustrations add much to the beauty of its appearance. Among the things which make its files valuable are the excellent "write-ups" of the various law schools of the country and of the supreme courts of the different states which are now being given from time to time.

THE *American Law Register and Review*, despite the objections of the venerable *American Law Review* that it is infringing upon the latter's trade name, continues to issue monthly under the name. It has followed the example set by the MICHIGAN LAW JOURNAL and discontinued the practice of issuing its numbers with pages uncut, and sends us the August number neatly trimmed. It has some illustrious names upon its title page under the heading "Editorial Committee." To this our esteemed friend, the *American Law Review*, also objects, and we think for good reasons. However, these superficial defects, if they may be called such, have not affected its contents in the least, and the last few numbers have contained many articles of real merit. The annotations of cases given in each number are valuable briefs upon the subjects treated.

THE *New Jersey Law Journal* is of special interest just now as it is giving special attention to a very live subject, the law of electricity. One of its able editors, Mr. Edward Q. Keasbey, is the author of a very recent and valuable addition to the literature on that subject. We would not be understood as intimating that it neglects other branches of the law, however. The articles it publishes are usually of a high order, and the decisions it reports, generally from the New Jersey Courts, are well selected from the leading cases on a variety of subjects.

THE *Weekly Law Bulletin* and the *Ohio Law Journal* have been consolidated and both issued under the same cover. Its class of contents varies somewhat each week. Several decisions of the Ohio Supreme Court are usually reported, and a digest of many others. Every law journal has its distinguishing feature: that of the *Weekly Law Bulletin* is its report of Ohio Circuit Court decisions.

"A WEEKLY journal of legal information" is what the *Washington Law Reporter* claims to be; and it seems to be living up to the claim. Coming from the "Capital City" it evidently does not deem itself restricted in its field, for we believe we have read in its reports of decisions

from nearly every state in the Union, in the last few months. It's a little partial to the Supreme Court of the District of Columbia, however. The courts and bar in its bailiwick have wisely placed in it considerable of their legal advertising.

THE same favors have been shown the *Pittsburgh Legal Journal*, one of the oldest of law periodicals. It is evidently held in high esteem by the local bar, for they render it praise-worthy support, nearly one-half its pages being filled with legal advertising and professional cards. The remainder is devoted to reports of important decisions of the Pennsylvania Courts.

NEARLY sixteen years ago the first number of the *Virginia Law Journal* was issued. The cases it publishes are usually decisions of the courts of its own state, but once in a while an important case from a neighboring state is reported. Nearly every number contains a short article upon some legal subject. The attorneys throughout its native State are well represented in it by professional cards.

THE *Medico-Legal Journal* is issued quarterly in March, June, September, and December of each year. The September number will be the second number of volume ten. Each number contains about 125 pages, and a great variety of subjects are treated. Much of it is far too technical for us to comprehend, but it must be an extremely interesting and valuable magazine for medico-legal gentlemen and the medical profession generally. We notice in it that our friend, Professor Victor C. Vaughan, dean of the medical department of the University of Michigan, is one of the vice-presidents of the Medico-Legal Society. A very good half-tone portrait of him appears upon the frontispiece of the June number, among a group of well-known medico-legal jurists and medical men.

WE SAID the *Law Journal*, (London) was our only foreign exchange. That is a mistake. From across the line comes the *Western Law Times*, of Canada, published at Winnipeg. It reports one or two cases, usually decisions in the Queen's Bench for Manitoba, in each issue, but rarely has a headed article. Under the headings, "De Praesenta," and "Flotsam and Jetsam," considerable interesting reading upon a variety of subjects is given each month.

WE ARE pleased to note among our exchanges, four college law journals. The one widest in its scope is the *Inter-Collegiate Law Journal*. It has just sixty editors. The three principal editors are connected with two of the New York City law schools, while it has an associate editor from fifty-seven of the leading colleges in the country. It is only issued during the collegiate year, and the June number closed its first volume. Its articles are upon a wide range of subjects and it numbers some well-known members of the bar among its contributors.

THE *Harvard Law Review*, also issued during the collegiate year, is the oldest college law journal, having just completed its eighth year. We have been much interested in reading some of the articles contained in the

last few numbers. They are not always what a busy lawyer would call strictly practical, to be sure, but they are instructive and entertaining. Its editorial page frequently contains some very spicy paragraphs. It seems to be living up to the good example set by its former volumes.

THE *Columbia Law Times* is one year younger than the *Law Review* and is also issued eight times a year. It branches out a little further than its contemporaries, and claims upon its title page to be "a magazine of law and political science." It is printed with double column pages and has quite a number of editors and correspondents. We notice that our old friend and class-mate, Mr. Fred A. Henry, is listed as the correspondent from Ann Arbor. As Mr. Henry graduated and left Ann Arbor year before last we would suggest that a change be made in that particular. Some of its departments are merely of local interest. It has been particularly fortunate in the contributions it has received and published during the last year, some of them being of unusual interest and value.

THIS last comment also applies to the *Yale Law Journal*, which is issued six times a year by the students of the Yale law school. It is a very spruce looking magazine and we like its typographical appearance very much. It, too, completed its first volume with the June number. Its editorial page often contains some forceful and timely comments. We were particularly interested in the editorial upon the need of reform in criminal law and criminal procedure in the May number, and many of the things said therein have our hearty sanction.

THE *Collector* is our nearest neighbor. It is published monthly at Detroit, and its name tells what it is here for. We would not attempt to tell what all it contains because we find something new in it every time we pick it up.

THE *Lawyer and Credit Man* is also a monthly. It is published at Kansas City and St. Louis, and its object is to do all it can for the people it is named after. It seems to be fulfilling its mission well.

THE *Collector's Guide*, also published at Kansas City, is striving to cover the same field as its older rivals. It is only three months old yet, but is making a plucky effort. It contains quite a complete list of reliable attorneys from every State.

THE *Legal Intelligencer*, formerly frequented our *sanctum sanctorum*, but it stopped coming some-time ago. We do not know just when, for we probably did not miss it for a long while, as we seldom had any use for it. We naturally concluded that we had been stricken from their exchange list, and wrote them asking if such was the case. We were informed by a very short and crisp note that our conclusions were correct. It grieved us to the heart to be thus unceremoniously cut off by the "oldest law journal in the United States," as it declares itself to be in such glaring letters. To be sure, the paper itself was of little if any use to us, but we did want to keep a file of its supplement, the *Advance Reports*. However, so long as the above friends stand by us, we will try and get along without our venerable "legal intelligencer."

BOOK REVIEWS.

INDEX TO CASES DECIDED BY SUPREME COURT OF MICHIGAN, AND RULES OF SUPREME COURT. By Charles C. Hopkins, Clerk Supreme Court. Lansing, Mich.: Robert Smith & Co.

This volume was prepared by Mr. Hopkins at the request of the Supreme Court, and will be found of great convenience, not only to the justices, but to lawyers generally and to those having a practice before the Supreme Court, in particular. The Supreme Court rules, being those in force June 7, 1892, are carefully indexed. The cases are those decided since Jacob and Chaney's digest from October 19, 1888, to April 8, 1892, including cases heard the January term, 1892.

R. S.

THE TOWNSHIP CLERK'S MANUAL OF ILLINOIS.—By Andre Matteson, of the Illinois Bar. Chicago: Legal Adviser Publishing Company.

This manual of 109 pages, bound in flexible black cloth, has the double advantage of being serviceable to the township clerk and instructive, to the citizen. It contains matters in which every property owner and every elector should be well versed, for it treats of things which concern him more immediately and vitally than the acts of the state legislature or the national congress. The manual is divided into two parts, the first concerning the town clerk, and the second concerning the village clerk. The first part contains a very entertaining discussion of the evolution of the township system in general and its development in the state of Illinois in particular. In the eleven chapters of the first part are treated the township government, election, duties of the officers, the township meeting, miscellaneous duties, the board of auditors, the board of health, the board of highway commissioners, election upon public questions, the drainage board, and the compensation of township officers. The second part treats of the village in Illinois, the village election, duties of officers, a discussion of the question of special taxation which is now troubling the people of Illinois, and the general form of keeping the journal of proceedings.

R. S.

ELECTRIC WIRES IN STREETS AND HIGHWAYS.—By Edward Q. Keasbey, Editor, *New Jersey Law Journal*. Chicago: Callaghan and Company.

The chief value of this publication is that it treats of a timely subject, and discusses problems with which nearly every municipality of consequence in the country is at present wrestling. It is also a subject of growing importance, and while it cannot be said that the law is at all settled upon very many of the questions that have arisen in electric

litigation, yet the author points out very clearly in what direction the decisions of the courts are tending. The discussion includes the rights of the public and owners of abutting land with respect to the occupation of city streets and country roads for the telegraph and telephone lines, electric light wires, and the over head wires of the electric railway; also the rights of telegraph companies, under the Act of Congress and at common law, to stretch their wires along the railroad. The author discusses the underlying principles, and also gives a full account of all the cases, some of which have never been reported, bearing directly upon the subject of electric wires in the streets. This work is an invaluable one to the practitioner who desires to keep abreast of the times. There is a wide field for a specialist in electrical law, and Mr. Keasbey is a very safe teacher to follow.

The only other attempt to compile the recent law in which electricity has figured, resulted in the work by Hon. Seymour D. Thompson on the "Law of Electricity." Judge Thompson's book is a recent one, but it must be said that it contains very few recent decisions. It is principally a compilation of telegraph and telephone law, and what little discussion there is upon the law relating to the electric railway and the electric light does not seem to come from the pen of one who, like Mr. Keasbey, has given the subject the most thorough and painstaking study and research. As editor of the *New Jersey Law Journal*, Mr. Keasbey has had the opportunity to note all of the recent electric cases. What makes his book entertaining, are the evidences that crop out on nearly every page that the author is enthusiastically interested in his subject, and that its preparation was more of a pleasure than a task.

R. S.

MICHIGAN LAW JOURNAL.

VOL. I.

OCTOBER, 1892.

No. 9

REFORM OF MICHIGAN CIRCUIT COURTS.

ROBERT E. BUNKER, Esq.

There is a growing sentiment among the people of the state that the legislation, under which the Circuit Courts of Michigan are organized and conducted, needs speedy and radical revision. Among those who have most to do with these courts, lawyers and business men, this sentiment amounts to a positive conviction. It is confined to no particular quarter of the state, nor is it limited to lawyers alone. Complaints about the system are heard on almost every hand. There is great unanimity of opinion that there are too many circuits and too many judges. Legislature after legislature has gone on creating new circuits until the number at the present time is thirty-three. Twenty circuits properly conducted could easily do the business now done by the thirty-three. Twenty circuits should be the maximum number. This statement is based, not upon the opinion and experience of any one person, but rather upon the average experience and opinions of prominent members of the bar and of business men who have had exceptional opportunities for observing the work of the courts. Indeed, many well informed lawyers over the State would put the maximum number of circuits considerably below twenty. I cannot speak from personal knowledge of the necessity, or the supposed necessity, for the division of circuits from time to time, and the creating of new circuits out of parts of old ones. I am fully persuaded, however, that in many cases the necessity did not exist at all, and that if any remedy were needed to accommodate localities, or to facilitate the business of the courts, a different one should have been applied. There are a number of circuits in the State, the business of which would not keep a good judge employed, to exceed four months out of the twelve. The result is what might have been anticipated, a less efficient administration of the courts and a greater expense to the tax-payers. Local influences and political considerations would play a less conspicuous part in the administration of courts were the circuits larger. The judges would be more competent if for no other reason than that there would be a larger field to draw from. They would be subjected to fewer annoyances and be altogether more independent.

The Fourteenth Judicial Circuit now composed of the counties of Muskegon and Oceana, affords a fair example, it may be presumed, of recent divisions. Prior to 1881, the Fourteenth Judicial Circuit for some years was composed of the counties of Muskegon, Oceana, Mecosta and Newaygo. These counties are situated conveniently to each other, and a judge in any one of them might reach any of the others without much trouble or delay. From 1877 to 1881 they continued to form the Fourteenth Judicial Circuit. In 1881 the counties of Mecosta and Newaygo were detached from the Fourteenth Judicial Circuit and were formed into a judicial circuit by themselves known as the Twenty-seventh. The formation of two circuits out of the four counties was not justified by the demands of territory, or of the business of the court. There has been no time since the four counties were constituted into one judicial circuit when the business of all of them could not have been easily done by a single judge. The division was made at a time when court business in those counties was on the decline. The great lumber industry of those counties was then waning. It is safe to say that that industry made more business for the courts than almost all the other industries of the counties combined.

It is for such reasons as these, among a multitude of others, which the limits of this article will not permit to be mentioned, that the assertion is made that no necessity ever existed for putting these counties into separate judicial circuits. The Twentieth Judicial Circuit may be taken as another example. It is composed of the counties of Allegan and Ottawa. Those counties might be added to the counties of Muskegon and Oceana, and the four together be formed into a single judicial circuit. One judge could easily do the business of these four counties. There are many other counties of the state formed into judicial districts by themselves which stand on the same footing as the counties above referred to. An initial step in the work of reforming the circuit courts of the state should be taken in the direction of reducing their number. It cannot be claimed, of course, that the mere reducing the number of judicial circuits will effect the reform desired. The salary paid to circuit judges is entirely inadequate. No thinking citizen of Michigan will dispute this assertion. It is for the interest of the people at large that adequate salary should be paid to the judges of courts in order that selection may be made from the most competent members of the bar. There is no reason why the people of Michigan should expect to have the business of the State done for less money than private individuals the State over are willing to pay. It is a lamentable fact that the instances are numerous where suitable men have refused to take a position on the bench because of inadequate compensation. It is economy for the state to pay such compensation as will secure for the bench the best men of the profession. The salary of a circuit judge ought to be at least \$5,000 per year. The cost in the aggregate of running the courts under the system suggested in this article would not exceed that which is at present paid. The indirect saving would be great. The judges

who preside over the circuit courts should be expected to put in their full time in the work of the court and should be compensated adequately for such time. Twenty circuits presided over by twenty judges and such additional judges as particular localities may require, will do the business of the State much better than it is now done. The coming legislature cannot, in the opinion of the writer, address itself to more important work than that of reforming the circuit courts of the State. A reform on the lines suggested here can result only in advantage to the people at large.

It is not intended to suggest a manner of reformation which shall exclude all others. It seems to be so clear, however, that there is an excess of judicial circuits, that a reformation should begin with reducing their number. This must necessarily be coupled with an increase of salary for the judges who preside over them. A fair presentation of this subject to the people would without doubt induce them to increase the salary so as to afford adequate compensation. The people should be asked for an expression of their views upon this subject at the earliest date possible. The time is opportune for reformation in the courts on the lines suggested in this article. If it is postponed beyond the spring election, things must exist as they are for the next seven years. It is unfortunate that the machinery of our government is such that the people must be called upon to vote upon the question of increasing the salaries of judges or endure the present system for seven years longer. The matter should not be postponed; it should be considered by the coming legislature and the constitutional question be submitted to the people at the first election possible. The manner of providing jurors to serve in the circuit court should demand attention in connection with this subject. A jury commission, something like that now provided for the County of Wayne, should be provided for each county of the State. It goes without saying that the present method of providing jurors for service in the circuit court is entirely unsatisfactory. In the localities with which the writer is acquainted, the better class of business men escape jury duty almost entirely. No citizen of the community is too good to serve his time in doing jury duty. If something like the measures suggested here are carried out, Michigan will have better courts. The courts will have better judges and juries. Good judges help greatly to make good jurors. Good judges will have good jurors. The judgments of courts under such circumstances which shall not do full justice to litigants will be indeed exceptional.

These suggestions have been hastily made in the hope that the coming legislature will take active steps looking toward the reformation of the circuit courts of the State on something like the lines here suggested.

WATER WORKS' FRANCHISES.

CHARLES E. TEMPLE, Esq.

It is only by a review of the leading American cases that we can understand the course of reasoning which has given prominence to municipalities granting special privileges to private corporations in the exercise of what would appear to be better for the public body corporate to undertake. When the policy of granting franchises is considered, the measures urged appear to be requisite for the safe completion of the undertaking, thereby relieving the home government of unusual burdens. It seems to be a popular proceeding and often carries with it a degree of responsibility which the councils of local governments do not care to assume. The right of the village trustees or city council to grant franchises for water works' purposes has long been recognized as a legal privilege. In Michigan, they are given express power under certain restrictions. The statute is quite clear as to the manner of procedure. The franchise generally assumes the terms and conditions of a municipal contract, granted on the part of the village or city authorities and accepted by the corporation undertaking the construction of the works. There is usually a reserving clause by which the village or city binds itself to purchase the works within definite periods of time at a cost to be determined by arbitration. In some contracts the charges for the use of water are fixed by schedule water rates. The forfeiture clause appears in all such instruments, which are seldom enforced except in cases of actual gross negligence or abandonment. The most important feature of these municipal contracts, is that relating to the agreements on the part of the village or city, to pay into the treasury of the water works company or its legal trustee under the mortgage, a certain fixed sum for hydrant rentals and consumption of water for public uses. The revenue arising from domestic use is not taken into much account by the municipality, but is left to the energies and business enterprise of the water works company, which in many instances has proven a source of large revenue.

The annual hydrant rental arising from these contracts is used generally by the water works company to pay the interest on the bonds issued for the purpose of constructing the works. Under right conditions the bonded indebtedness represents about the cost of the works. But there are so many cases where the hydrant rental is insufficient to meet the interest on the sum actually expended, that the difference between the cost and the amount of bonds issued has to be provided for in other ways. It should be born in mind that where this difference exists, the

ratio between the bonded indebtedness and the total cost of the works is safely put at 40 to 60.

The bonds issued by the water works company are quasi-municipal in character, when the amount to be paid by the municipality is set aside to meet the interest of the bonded debt. They partake of many features of straight "municipals," but lack the essential quality attached to obligations issued under direct municipal sanction. The payment of the hydrant rental by the city is raised by tax and is often quite enough to meet the fixed charges. The faith and credit of the city is thus pledged for meeting the annual interest of the funded debt of the water company. Where this rental is paid by the city direct to the trustee under the trust mortgage for the use of the holders of the bonds, it fairly may be said to rank next to a municipal bond. If this rental were paid into the treasury of the water company, the directors might use it for current purposes, thus defeating the real object investors had in mind on taking the bonds. The history of water works companies show that its bonds, when issued properly, in a city where the demands for water are sufficient to meet the operating expenses as well as the interest on its bonds, are a safe investment and that the security is usually ample for the payment of the coupons as well as the maturing principal. This is especially true after the works have adequately met the demands made upon them for a number of years, thereby establishing confidence and good credit.

Perhaps one of the most serious questions, which confronts a prospective buyer of water companies' bonds, is the legality of the franchise. Of course the community where the works are to be constructed, the population and nature of the surrounding country, are taken into consideration. Eastern investors are very sensitive about these conditions, for if a town is prosperous, with a rich surrounding agricultural district tributary to it, but lacks the requisite number of souls, it is with great difficulty that the bonds issued by a water works company under a franchise can be floated, and if at all, only at a great sacrifice. There may be a sufficient reason why a band has been put around some of our prosperous western towns, but why this is so has never yet been satisfactorily explained by the investor, to the disfranchised.

If the absence of legislation, the charter of the village or city is the governing power which gives a municipality a right to enter into a legal contract, which by its terms pledges the faith and credit of the city, for the payment of the hydrant rentals. The greatest care should be exercised in determining the validity of the municipal proceedings in order that a future council may not take advantage of technical objections and "kick a hole" in the franchise, thereby diverting the revenues from their proper channel and putting the bondholder to the interminable difficulties of a possible foreclosure and purchase of the works.

Another serious difficulty in connection with contracts of this kind is the alleged right of tax payers to begin proceedings by injunction, upon some

imaginary grievance for the purpose of stopping the payment by the municipality of its pledged rental agreements. These suits aim to prevent the raising by taxation or otherwise the amount of money agreed upon to be paid for hydrant rentals and water for public uses, as well as to the question of the power of the council to contract. Assuming that a council has the power to grant franchises of this character, it has never been quite clear to us that suits brought by dissatisfied taxpayers would have any standing in court. These contracts are generally for the good and safety of the entire community, not only as a means of providing wholesome water for domestic purposes, but also for fire protection. The interests of the water works company should not be jeopardized by the caprices of disgruntled taxpayers. Such proceedings always have a tendency to imperil the rights of the bondholder, not to mention the inconvenience attending the non-payment of the maturing coupons. In the exercise of supreme sovereignty it carries with it to the municipal representatives duly elected, all the power conferred upon either expressly or impliedly. In the selection of these agents, it is presumed they will duly exercise the powers, lodged in them, for the public good and welfare. Where it is clear that the right exists to grant a franchise to a private corporation having in contemplation the construction of water works adequate for the needs of the community, it would seem that such proceedings could not be contested by third persons. If the water company fails to comply with the terms of its agreements, the municipal authority would undoubtedly have the right to make demand or proceed to annul the franchise, and on the other hand, the water company could compel the payment of the hydrant rental, if refused. But where this power is abused and it imposes illegal burdens on the taxpayers, the right of action lies to enjoin payment of revenues pledged by the municipal authorities. Such proceedings may be brought properly by those against whom the illegal burdens are sought to be borne.

The recitals in the trust deed given by the water works company, the proposed form of bond and the form of acceptance of the trust under the mortgage should be drawn with care and critically examined. There should be no discrepancy between the bond and the mortgage, and if there be any, it should be reconciled before the mortgage is executed. It is for the bondholder to consider whether in view of the inconvenience in securing united action in case of foreclosure on a part of the holders of the majority of the bonds, it would not be better to have the power conferred on a less number. The mortgage should contain a clause authorizing the trustee to collect and receive from the municipality the sums coming due from it for its use of fire hydrants, during the life of the mortgage debt and apply such sums so collected to the payment of the interest coupons as they mature.

Where there is a condition which provides that in case the water works company should violate any of the provisions of the agreement with the village and the municipal authorities should claim the right to forfeit

the franchise or any of its privileges, the mortgage should recite that the trustee may, on request of a proper number of the bondholders, have the right to make good such default at the expense of the water company, and have a lien on the mortgaged property to secure the repayment thereof. The water company should, on the execution of its trust deed, promptly furnish the trustee with evidence that the trust deed has been duly recorded and also that it should furnish periodically to the trustee, evidence that all proper steps were taken to keep alive and perpetuate the lien as may be required by the laws of the State now or hereafter in force where the mortgage is filed for record.

Nearly all mortgages given by water companies contain clauses for the appointment of a receiver, but as we understand the law of Michigan, the mortgagor of real property is entitled to retain possession and receive rents and profits until after foreclosure and sale, so that so far as real estate is concerned, there can be no such thing as a receivership, even though the trust deed may expressly consent thereto, so that provisions in the trust deed, authorizing the trustee to take possession personally under certain circumstances, are not regarded as of much value.

Grand Rapids, Michigan.

RIGHT TO ENJOIN PUBLICATION OF A LIBEL.

GRAND RAPIDS SCHOOL FURNITURE CO. v. HANEY SCHOOL FURNITURE CO., *et al.*

Michigan Supreme Court, July 28, 1892.

Where a company, which has for a long time, by means of libelous circulars, been threatening a competitor's customers with suits if they purchase goods of such competitor, alleging that their competitor is infringing its patent, a court of equity will restrain such company from using, publishing, or circulating a decree as to the validity of the patent, which has been obtained by fraud and collusion, for the purpose of injuring its competitor's business.

Appeal from Circuit Court, Kent County, in chancery; William E. Grove, judge. There was a demurrer to the bill, which was sustained, and complainant brings error.

Taggart, Wolcott and Ganson, for appellant; *Taggart and Denison*, for appellees.

Long, J.—The bill of complaint in this case alleges that the complainant is a manufacturing corporation having its office and manufactory at Grand Rapids. That ever since its organization, in 1887, the defendants have been engaged in circulating thousands of circulars containing the statement that the goods of complainant infringed a certain patent, and threatening to bring suit against any and all persons purchasing or using goods of the complainant's manufacture. These claims and threats were made in bad faith and with full knowledge that the said patent was invalid and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for infringement of said patent. The said threats were made for the purpose of intimidating parties who were likely to be customers of the complainant, and had to a considerable extent accomplished their object; but no suits having been brought for infringement of said patent, the threats had lost their force, and hence a fraudulent and collusive suit had been instituted for the purpose of obtaining a decree which could be used to deceive and intimidate the public. Such decree had been obtained, and the defendants had begun to use it for the purpose aforesaid and were intending to so use it continuously and on a very large scale, to the great injury of the complainant's business, though the amount of such injury was very difficult to prove or determine by any accurate measure. The prayer of the bill is that the said defendants may be perpetually enjoined and restrained from stating, publishing, or claiming, in any manner, that the said decree is anything other or different from a decree obtained by collusion, and from claiming

that it is an adjudication upon the merits as to the validity of the Haney patent, and from using such decree in any way or form to influence or threaten any person or party against purchasing said school furniture manufactured and sold by the complainant. To this bill the Haney School Furniture Company, one of said defendants, filed a general demurrer, and the case having come on to be heard upon said demurrer, the court held that the bill of complaint did not set up any facts giving a court of equity jurisdiction to grant relief, and entered a decree sustaining the demurrer and dismissing the complainant's bill. From this decree the complainant appeals to this court.

The English courts, by recent decisions, have exercised the injunctive jurisdiction to restrain injurious publications concerning property which operate as a slander of the owner's title, and libelous publications which are injurious to the plaintiff's business, trade, or profession, and the wrongful use of a name by which the public would be misled, and the plaintiff injured in his business. Thus far, however, most of the American courts seem unwilling to follow the example of the recent English decisions, and decline to extend the jurisdiction, so as to restrain such torts as libels on business, slanders of title, and the like. In Massachusetts the English decisions are expressly repudiated. *Boston Diatite Co. v. Florence Manufacturing Co.*, 114 Mass., 69; *Whitehead v. Kitson*, 119 Mass., 484. Injunctions to restrain libelous publications concerning plaintiff's business were also refused in *Association v. Boogher*, 3 Mo., App. 173; *Mauger v. Dick*, 55 How. Pr. 132; and *Singer Manufacturing Co. v. Domestic Sewing Machine Co.*, 49 Ga., 70. In the case of *Emack v. Kane*, 34 Fed. Rep. 46, Judge Blodgett allowed the injunction. It appears that Kane issued and widely distributed circulars, in which he claimed that Emack's goods infringed his patent. He stated that he should not sue Emack, but should bring suits against all customers of Emack and collect royalty and damages from all of them. Judge Blodgett said: "The *gravamen* of this case is an attempted intimidation by the defendant of complainant's customers by threatening them with suits which defendant did not intend to prosecute. * * * If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and his ruin would be accomplished before an adjudication could be reached." In the recent case of *Casey v. Typographical Union*, 45 Fed. Rep., 135, the case of *Emack v. Kane* (supra) was cited and approved by Judge Sage. It appeared in the Casey case that parties had conspired together to injure the complainant in his business. Circulars were gotten out and widely distributed, containing threats of pecuniary loss and injury to those who should do business with the complainant. The claim was made in that case, as in this, that equity had no jurisdiction, because the injurious publication was merely a libel on complainant's business, and, for any loss which the union inflicted, he had a plain and adequate remedy at law. Judge Sage remarked, how-

ever, that it is idle to say that such publications are nothing more than libels, and that the only remedy for the injury inflicted was an action at law; that, while they have certain characteristics of libels, they are more than libels, and there is no plain and adequate remedy at law for such injuries.

We think the bill in this case states a case materially different from the Massachusetts cases and the other cases holding that equity has no jurisdiction to restrain a libel. Here it is claimed and alleged in the bill that Elijah Haney and the Haney School Furniture Company entered into a conspiracy with defendant Bullard to obtain a decree in favor of Haney v. Bullard which might and should be used by the conspirators to injure the complainant. The fact is recited that, in pursuance of such conspiracy, a bill was filed in the United States Court for the Eastern District of Michigan, and a decree obtained by fraud and collusion, for the purpose of benefitting the trade of the Haney School Furniture Company at the expense of complainant: that the defendants well knew the patent was invalid; and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for the infringement of said patents. The prayer of the bill is, not that defendants be enjoined from making whatever claims they see fit concerning their patent, nor from threatening to bring suits, even though such threats be made in bad faith; but that the defendants be restrained from using a decree fraudulently and collusively obtained, to the injury of complainant, and from claiming that such decree is an adjudication upon the merits as to the validity of such patent; or from using it in any way or form to influence or threaten any person or party against purchasing said school furniture manufactured and sold by complainant. The case, as stated in the bill, is certainly more than a mere claim for an injunction arising out of a libel of complainant's business. A conspiracy is claimed to have been entered into between the defendants for the very purpose of injuring the complainant, and that by such conspiracy a false and fraudulent decree was obtained, settling the rights of the Haney School Furniture Company to the patent under which the complainant was and is operating; that the defendants are publishing to the world, and especially to the customers of the complainant, that such decree was valid, the defendants well knowing it to be false and fraudulent; and that, in any court where the complainant had the right to appear and be heard, it could establish the fact that such patent was absolutely void, and that Mr. Haney and the Haney School Furniture company had no rights under it, and that complainant was legally entitled to its use. Admitting that the weight of authority in this country is against the proposition that a court of equity has no jurisdiction by injunction to restrain the publication of a libel upon one's business, it is no answer to the questions here raised. The complainant has no adequate remedy at law, under the circumstances here stated. It cannot be said that it should lie by and wait the slow and uncertain processes of a suit for damages for its redress.

Under the charge in the bill, which we must take as true, the complainant is rightfully operating under such patent, and it has no remedy adequate for the fraud and wrong perpetrated upon it, except as aided by a court of equity. The facts stated make a much stronger case than that of *Casey v. Typographical Union* (supra), calling for the aid of the injunctive power of a court of equity. The decree of the court below must be reversed, with costs, and the demurrer overruled. The defendants will have twenty days to answer the bill.

The other Justices concurred.

NOTE.—The sole question for review by the Supreme Court was whether equity had jurisdiction of a bill to enjoin defendants from using a decree, as to the validity of a patent, the decree being fraudulently and collusively obtained, in a circular threatening complainant's customers with suits if they purchased goods from complainant, in the construction of which the patent was used. Defendants claimed in brief, that the facts in the bill made out a case of libel, if anything, that equity had no jurisdiction of libel, and that complainant's remedy was by action at law. The complainants, on the other hand, asserted that there was no plain and adequate remedy at law, that they could not be required to await the slow and uncertain process of a suit for damages, and that if equity could not restrain, they would be practically remediless. The Supreme Court of this state sustains the latter view. The precise question involved in this case is a new one in this state, and it is a matter of congratulation that the Supreme Court has followed that line of decisions which is founded upon the principles of justice rather than upon cut and dried precedent. The defendants present a large number of decisions, both English and American, which show almost beyond contradiction that the injunctive jurisdiction does not extend to libel, as it is ordinarily understood. But there are elements in this case which justify a resort to "the strong right arm" of equity, as some one has aptly termed the injunction. Those elements are, the necessity for immediate relief, and the lack of adequate remedy at law. In *Townshend on Slander and Libel* (4th ed., sec. 417 a.,) this statement is made: "The courts will in some instances interpose by injunction to prevent the perpetration of a wrong, but as a general rule the publication of an alleged libel will not be stayed by injunction." The counsel for defendants in this case do not seem to have made the point that is sometimes urged in similar cases, viz.; that the restraining by injunction of a circular is unconstitutional since it is an abridgment of the right to freedom of speech and publication. The proper remedy, under this view would be an action at law for damages resulting from such publication. But whether such an injunction would be unconstitutional would depend upon the phraseology of the constitution of Michigan. In *Brundreth v. Lance*, 8, Paige Ch., 26, the chancellor said: "It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press. . . . This bill presents the simple case of an application to the court of chancery to restrain the publication of a pamphlet which purports to be a literary work, undoubtedly a tale of fiction, on the ground that it is intended as a libel upon the complainant. The court of star chamber in England once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages. (Hudson's Star Chamber, 2 Collect. Jurid., 224). And, as

an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court to prohibit or restrain the publication of a libel, as such, in anticipation. (8 Howell's State Trials, 198). Eden on Injunction (p. 374) says: "So little has it been supposed that such a jurisdiction belonged to the court of chancery, that it would be difficult to find any authority in which it has been in terms denied." There seems to be two distinct lines of decisions, some courts being disposed to extend the jurisdiction of equity to libels affecting property or in some instances, reputation, while others are inclined to confine the jurisdiction of such cases to courts of law. *Dixon v. Holden*, L. R., 7 Eq. 488, is a strong case in support of the former of these views. It proceeds mainly on *Routh v. Webster*, 10 Beav. 561. See also *Springfield Spinning Co. v. Riley*, L. R., 6 Eq. Cas., 551. *Presidential Assurance Co. v. Knott*, L. R., 10 Ch. App., 142, leans towards the latter view, which is supported by *Beddow v. Beddow*, L. R., 8 Ch. Div., 92. These are the principal English decisions. In addition to the American cases cited in the above opinion, there are several cases which decide that equity has no jurisdiction of libel, and in which the circumstances are somewhat similar to the above case. These are: *Kidd v. Horry*, 28 Fed. Rep., 773; *Wheel Co. v. Bemis*, 29 Fed. Rep., 95; *International Tooth Co. v. Carmichael*, 44 Fed. Rep., 350; *Francis v. Flinn*, 113 U. S., 385; *Consumers Gas Company v. Kansas City Co.*, 13 S. W. Rep., 874; *Mayer v. Association*, (N. J.), 20 Atl. Rep., 494. Bearing upon the principles of the contrary view are: *Pom. Eq. Juris.*, sect. 1355, note 2; *Doty v. Martin*, 32 Mich., 462; *Paine v. R. R. Co.*, 46 Fed. Rep., 546; *Lewis v. Cocks*, 23 Wall., 470; *Kilburn v. Sunderland*, 130 U. S., 514; *Middleton v. Flat River Booming Co.*, 72 Mich., 533; *Ryan v. Brown*, 18 Mich., 212; *Koopman v. Blodgett*, 70 Mich., 610. Judge Henry B. Brown, before going upon the bench of the Supreme Court of the United States, said in *Cole v. Ypsilanti, etc. Co.*, 44 Fed. Rep., 19, "There is undoubtedly authority for holding that if the language of such letters or circulars be false, malicious, opprobrious, or used for the willful purpose of inflicting injury, the party is entitled to remedy by injunction."

The circulars, of which the Grand Rapids School Furniture Company complains, undoubtedly injuriously affected their business. In this suit the defendants demur, and do not answer the charges made in complainants bill. If such charges should be true in any case, the decisions of any court, which should grant speedy relief to the firm which is suffering, would be welcomed as an indication that the courts are disposed nowadays to dispense justice even at the risk of upsetting in slight degree, the rigid *dictums* of precedent. This case serves to illustrate to what extremes business corporations, in the sharp competition for business, will go to steal trade and customers from their rivals. It is a flagrant case of commercial piracy, if the facts are as alleged.

Since the preparation of this note, the *New York Law Journal* published the above opinion in full and commented upon it, in part as follows: "In many quarters the necessity is recognized for a remedy by injunction against guerrilla practices in business competition. In the Michigan case, printed to-day, and the two cases from federal courts which it cites, the rule is nominally conceded that an injunction will not lie to restrain a libel, but it is said that other features besides that of libel are present

which override such rule. . . . Although the case may be an extreme one, it can hardly fail to be interesting to practitioners in all jurisdictions. It illustrates a modern tendency of courts to grant relief by injunction against defamatory statements when clearly no political rights of the person are at stake, but property or business is attacked, and may be destroyed, through a constitutional guarantee to the citizen of the privilege of lying."

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE,

ELI R. SUTTON.

H. D. JEWELL,

OFFICIAL PUBLICATION MICHIGAN STATE BAR ASSOCIATION.

Published monthly, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.
Address all correspondence to MICHIGAN LAW JOURNAL, Grand Rapids, Mich.

THE law department of the University entered upon the thirty-third year of its existence on October 3, the opening address being delivered to the classes separately by the dean of the department, Professor J. C. Knowlton. Although the indications are that the attendance at the University as a whole will increase above that of last collegiate year, it is possible that the attendance in the law department may fall slightly below that of last year, viz., 587. This calculation, however, may be upset by the influx of students after the presidential election, for it is known that large numbers of prospective students are engaged in the work of the campaign and will not return to the University until after election day. The applications for admission to the law department were fifteen per centum greater in number this year than ever before. But there has been an additional requirement for admission this year which has probably had the effect of keeping many away, or at least of deterring them from attempting the examination for admission. We refer to the requirement of prior knowledge of law, which was enforced for the first time this fall, although it has been under consideration by the Faculty for several years. No prior reading in law has heretofore been required of candidates for admission to the junior class. The Faculty are of the opinion, however, that for the first year, at least, more positive benefit is received from lectures and more advancement in law made by students who, before going to the school, have read the Commentaries of Blackstone, than those who are beginners at the law school. It is not required that the student shall spend any time in a law office before applying for admission. By private study he can, in a few months, easily obtain sufficient legal knowledge to prepare himself for his work at the law school. The portions of Blackstone's Commentaries which the entering junior must pass examination upon are: Book I

exclusive of chapters 3, 4, 5, 6, 8 and 11; Book III, exclusive of chapters 5, 6, 15, 16 and 17; and Book IV. Instruction is given in the department in Book II, and for that reason it is omitted from the requirements. Very many applicants understood this new requirement to mean that unless they were prepared to pass this examination upon Blackstone they could not enter the department. This understanding has had the effect of keeping many away entirely. But the circumstances are misunderstood. Those who are not prepared to pass the Blackstone examination have the privilege of entering under condition and they must pass a satisfactory examination in Blackstone before graduation. The Faculty have scrutinized the qualifications of applicants more closely this year, and the result is a better character of students than ever before. The graduates of other institutions are present in increased numbers, the class of '94 being remarkable for the number of degree men in it. Another indication of the improved character of the student-body is the large number of attorneys, members of the bar, in attendance. The organization of law schools in other states has not had the effect of drawing away from the number of students from those states, who usually attend the Michigan Law School. This is conspicuously true of Ohio and Illinois, where new law schools have recently been founded. The number of law students from those states is as large as ever. In fact, the attendance in the whole University has not diminished by reason of the existence of the large educational institutions in the west, notably the University of Chicago, a circumstance which would seem to indicate that the youth of the west do not come to the University of Michigan because it is the nearest educational institution but because it has built up for itself a reputation as a center of learning and an institution where a thorough and perfect education can be obtained at the least expense.

The courses of instruction in the two classes are not altered materially from last college year. In text-book work, Maxwell's Code Pleading, just issued from the press, will supersede Bliss on Code Pleading. The post-graduate course remains practically the same, although it is probable that some changes and improvements, in the way of special lecturers, will be made during the year. The loss of Professor Nathan Abbott, Tappan Professor of Law, is to be regretted. He left to accept a professorship in the Northwestern University Law School. The Board of Regents will probably fill his place at their October meeting. There are no other changes in the list of professors. E. F. Johnson, LL.M., has been continued as instructor in law. The Faculty will submit a plan for practical court practice to the Board of Regents at its October meeting which should receive their endorsement. It is for a practice court, as a supplement to the moot court work, or rather it will supersede the moot court work. The idea, is an original one, and should be favorably acted upon by the regents, the expense involved being practically nominal. It is an effort to inject a little of the practical into the theoretical work of

the law school. The one moot court case is at present the only practical work in the two years course which the students can take advantage of under the direct supervision of the professors. The club court work is practical as far as it goes, but it is not directed by experienced persons. If the practice court is established, each senior will be compelled to conduct three cases, a chancery case, a law case, and a criminal case. The court will have a regularly appointed clerk, sheriff, etc., the clerk being an assistant in the department who will keep complete records and receive a compensation, just as the quiz-masters do now. The students will be divided into groups of four, as in the case of moot court trials under the present system, and will be furnished with statements of facts, so that the proceedings will consist of the arguments only. The practice court will be governed by the same rules as the circuit courts of Michigan, except as to the filing of pleas, papers, etc., the time for which will be shortened. It is intended to have Hon. E. D. Kinne, judge of the Circuit Court of Washtenaw County, preside in two-thirds of these cases, and the law faculty in the remaining third. This cannot be called precisely an innovation in the system of teaching the law, but it is a decided improvement over the moot court plan, and its chief value is of course, that it gives the student a training and an experience which will be of practical value to him immediately after graduation.

There is plenty of room in the new law building for a practice court, and for all the literary societies, club courts and quiz classes. The new building is finished and occupied. The department is not now handicapped for room, but there is on the contrary, ample space for growth. The whole of the first floor of the old building is thrown into one room, and used as the library. The second and third stories of the old building have not been altered. The lecture room has not been enlarged, but it has been vastly improved in ventilation. In the new building, the entrance hall, the dean's office and the offices of the faculty occupy the first floor. On the second and third floors are a total of five large, well-lighted, and well-ventilated quiz-rooms. The new building presents a handsome appearance, and the largest law school in the country is now installed in comfortable and commodious quarters.

THE HONORABLE FRANK A. HOOKER, of Charlotte, circuit judge of the fifth judicial circuit, was nominated by the Republican State Convention at Grand Rapids on September 27, for the vacancy on the bench of the Supreme Bench caused by the resignation of the Honorable Allen B. Morse. Judge Hooker was born at Hartford, Conn., January 16, 1884. At twelve years of age he moved with his parents to Ohio, and subsequently settled at Defiance. He entered the law department of the University of Michigan, at seventeen, and graduated from there in 1865, and was immediately admitted to the Washtenaw County Bar. After practicing law for a year at Bryan, Ohio, he went to Charlotte. In 1867, he was elected superintendent of the Eaton county schools. He became justice of the peace in 1869. and prosecuting attorney in 1872, serving for five

years, when he declined renomination. In the spring of 1878, Judge Hooker was appointed to fill the vacancy in the fifth judicial district caused by the resignation of Judge Van Zile, who had been appointed United States District Attorney for Utah. He was elected to succeed himself in the fall, and was re-elected in 1881 and 1887. He has thus served nearly 14 years upon the circuit bench. The republicans have made a good choice, and it is to be hoped that the democrats will do the same.

THE right of the electric railway, operated by the trolley system, to occupy the streets is becoming more and more certain every day. Abutting property owners continue, however, to apply for injunctions to restrain the construction of such railway lines, on the ground that the erection and use of the poles and wires of the trolley system are an additional servitude on the soil of the street. The most recent decision on this point is that of *Sells v. Columbus St. Railway Co.*, Ohio Weekly Law Bulletin, September 26. The court, Franklin County, (O.) Common Pleas, decides that abutting owners are not entitled to an injunction. Two other recent cases deciding the same point are, *Koch v. North Ave. Railway Co.*, court of appeals of Maryland, and *State v. Trenton*, supreme court of New Jersey, not yet reported. There has been but one case where the courts have allowed an injunction to abutting owners, an Ohio case, and it was afterwards reversed by the Supreme Court of Ohio.

THE responsibility of mercantile agencies for the correctness of their reports to their subscribers was quite clearly defined in *City National Bank v. R. G. Dun*, decided in the present term of the U. S. Circuit Court, southern division of New York, where it was held that the mercantile company was liable for a false report made by an agent of the company as to the standing of a merchant, though the agent knowingly gave the false information with the design of benefiting himself thereby. Though it may seem to be somewhat of a hardship for the company, entirely innocent of any evil intentions itself, to be charged with all the misrepresentations and wilfully false statements its many agents throughout the country may make, yet it is simply the adherence to an old principle of law, which has long been firmly established, that the principal is liable whenever his agent, who is, at the time, acting within the scope of his authority and for the principal, makes a fraudulent misrepresentation which influences and is acted upon by the plaintiff to his injury.

THE report of the committee on legal education of the American Bar Association, made at Saratoga Springs, N. Y., at the recent annual meeting, makes the somewhat startling statement that in no other country in the world is the subject of the education of candidates for the bar in so deplorable a state as in America. The reports of the committees of the American Bar Association are known to be thorough and reliable, and therefore, this assertion is undoubtedly accurate. Those who have read Professor Knowlton's article upon "Embarassments to Legal Education" in the February number of the MICHIGAN LAW JOURNAL will be inclined to credit the statement of the committee of the American Bar Association. At the time of the annual meeting of the association, there was held a meeting of American teachers of law, over which Professor James B. Thayer, of Cambridge, presided. It was not not a thoroughly representa-

tive meeting, as but one western law school was represented. No formal organization was effected, but it was determined to form an association for the advancement of legal education, and it was decided to send out invitations to members of the bar association who are directly or indirectly concerned in the work of the law schools, or who hold chairs of legal instruction in colleges, to meet at Milwaukee next summer, in connection with the meeting of the American Bar Association, for a conference on the state and needs of legal education in the country.

A WILL made in a foreign country, though executed in accordance with the laws of the country where made, is not valid to pass real estate in this country. Such was the decision of the New York Supreme Court in *Vogel v. Lehritter*. Maria Anna Lehritter, a citizen of New York, owned property in the city of New York, but for many years prior to her death had resided in Wuerzburg, Bavaria, where she died. She left a will duly executed according to the laws of that country, but not in accordance with the laws of the state of New York. The court therefore held that as to the real estate in question, she died intestate. In order to arrive at this conclusion the court were obliged to overcome some strong arguments by the counsel for the party claiming under the will, and there are those who will no doubt question the justice, perhaps the wisdom of the decision. If this is the correct law it is certainly unfortunate that a person owning property in this country, who when death overtakes him, chances to be in a foreign land, where the strict compliance with the technical provisions of our testamentary laws is impossible should be denied the right to dispose of his property by will, and compelled to die intestate.

WE call attention to the circular letter, printed on another page, to the Bar of the state, sent out by the president and secretary of the State Bar Association, urging the lawyers of the state to ally themselves with the association. We are able to report that the responses are coming in rapidly, and the indications are that when the legislature meets next January, the State Bar Association, which is to present to it a plan for the relief of the Supreme Court, will be more of a representative organization than it is at present. Although the Virginia State Bar Association is two years older than the Bar Association of this state, there is no reason why it should be larger, more prosperous, or more enthusiastic. It held its fourth annual meeting last July at Old Point Comfort, and it was very largely attended. There were 148 at the banquet, while Michigan was represented by less than 60 at its banquet. Concerning the last annual meeting of the Michigan Bar Association, the *Albany Law Journal* says, "Everybody knows that Grand Rapids is the greatest centre of furniture manufactories in the world. It has even been stated that its people have the purpose of constructing Federal Cabinets. The last meeting of the Michigan State Bar Association was held there, and its proceedings, of very considerable interest, completely fill the last number of THE MICHIGAN LAW JOURNAL. . . . The attendance seems to have been mainly in the immediate vicinity, so the proceedings disclose." This last statement is only too true. It is an indictment, by implication, of those members of the association who failed to exhibit enough interest in the association and its objects to travel a distance to attend its annual meeting.

WHAT CONSTITUTES CHAMPERTY.—During later years contracts have not been assailed as being champertous nearly as often as formerly. The case of *Reece v. Kyle*, very recently decided by the Ohio supreme court, is therefore of more than ordinary interest. The question brought before the court was, whether a promise by an attorney to render legal services in an effort to collect a judgment, for obtaining which the attorney has not been fully paid, and to advance costs and expenses in the first instance, one-half to be repaid by the client in case of failure, forms, as between attorney and client, a valid consideration to support an assignment of a judgment, the net proceeds of which are to be equally divided in case of success. Quite an exhaustive and interesting opinion was rendered by Chief Justice Spear, in which he discusses "maintenance" and "champerty" at some length and points out very clearly the difference in the conditions of society at the present time and at the time when statutes forbidding so-called champertous agreements were passed. He concludes:

"Of course if a proposed contract is clearly against public policy, the courts will say it cannot be entered into. But why, applying this test, should we limit the subject of contracts for compensation otherwise than by discriminating against transactions which are prohibited by statute or are immoral or hurtful in their nature, in the sense of contravening some established interest of society? That contracts similar to the one at bar were regarded dangerous three or four hundred years ago is not a powerful reason for so regarding them now, when we consider that social conditions and the law in other important respects, have undergone radical changes. Fortunately the condition of society to-day is on a higher plane than in the chaotic times of Henry VIII, our judicial methods are more enlightened, and the day of combinations among the powerful to oppress the weak in the courts has gone by.

"It will be borne in mind that great scrutiny was given in England to the acts of counsellors and attorneys, because of the peculiar relation which the law placed those officers in with regard to their clients. The former were incapacitated to make any contract for compensation with the client, though they might accept a gratuity, while the latter might make such contract only as the law had made for him in fixing for every service a corresponding fee. A contract therefore between a counsellor or attorney and his client for a share of the thing in suit, would have been invalid on this ground as well as others. No such strictness ever obtained here. Our laws have always recognized the right of either to compensation for his legal services in a reasonable amount, either on a *quantum meruit* or upon special contract. Beyond this the propriety of accepting compensation by way of a fee contingent upon the event of the suit, and payable out of the thing recovered, has been recognized; also the advancing by the attorney, for the benefit of the client, of funds in payment of costs and necessary incidental expenses. Indeed such advances by the attorney in the progress of litigation are so common that to denounce the practice as improper would be to condemn the daily acts of the most honorable members of the profession. . . . The conduct of attorneys is subject to proper scrutiny by the courts. The maintenance of a high character for dignity and integrity on their part is essential to the security of the community and the due administration of justice. Any infraction of the letter of this statute would entail its penal consequences upon an offending attorney, and the courts would not hesitate to hold void any contract violative of its spirit, whether coming within the strict contract or not. So too the courts have been, and continue to be, careful not to sanction

contracts which appear to encourage a gambling spirit, one leading to the prosecution of pretended or obsolete claims, for a possible high reward. And anything like sharp practice, or the taking of undue advantage by the attorney of the confidence or necessities of the client, would meet with no favor nor mercy at the hands of the courts. At the same time it would not be wise to carry rules adopted originally for the purpose of preventing the powerful from oppressing the weak, by groundless suits in the courts, to the extent of hindering the weak in efforts to avail themselves of lawful remedies against the powerful, now that the conditions making the ancient rules necessary have substantially disappeared, and new conditions arisen, by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts.

"Nor would it be judicious to extend arbitrarily those rules which say that a given contract is against public policy, for men of full age and competent understanding ought to have the utmost liberty of contracting. Their contracts, when entered into freely and voluntarily, should be held sacred, and should be enforced by the courts, for it is a paramount public policy that courts should not lightly interfere with the freedom of contract. It is much more easy to denounce in general and sweeping terms, contracts said to involve champerty, as 'odious' and 'worthy only of the severest condemnation', than it is to point out wherein it is wrong to make an effort, under the circumstances disclosed in the case at bar, to enforce a claim solemnly adjudicated by a court to be just and legal, by one who has an interest in the judgment because of services rendered in obtaining it. It is difficult also to perceive how such a proceeding would contravene any established interest of society, or tend to corrupt the fountains of justice, or bring the legal profession into disrepute."

This decision is no doubt founded upon reason and good sense. The conditions which gave rise to the passage of the old English statutes upon the subjects of maintenance and champerty, and made strict laws necessary, have long since passed away. Before passage of 32 Henry VIII, ch. 9, it was a common practice for nobles and others occupying positions of power to secure pretended rights of action and prosecute them. As the juries were frequently, probably almost invariably, composed of men who were dependent upon these unprincipled claimants, a great injustice and oppression was worked upon the weak. To remedy this evil practice the above statute was passed. The conditions of society and the practices of men have undergone a complete change since then, and the holding of the court in the above case is undoubtedly in harmony with the trend of modern decisions. That this is so can be seen from an examination of the following decisions of the United States Supreme Court: *Wylie v. Coxe*, 15 How., 415; *Lewis v. Bell*, 17 How., 616; *McMicken v. Perrin*, 18 How., 507; *Wright v. Tibbitts*, 91 U. S., 252; *Stanton v. Embrey*, 93 U. S., 548; *McPherson v. Cox*, 96 U. S., 404; *Taylor v. Bemiss*, 110 U. S., 42; *Jeffries v. Mutual Life Ins. Co.*, 110 U. S., 305.

THE resignation of Marshall D. Ewell, M. D., from the Northwestern Law School of Chicago seems to have been followed by disastrous consequences to that institution. The split in Chicago differs from the recent division in the Columbia Law School of New York, the latter being caused by a difference of opinion as to the proper methods of teaching, while the former resulted from differences between the president of the university and one of its most popular professors, which ended in the resignation of

the latter. In both cases new schools have arisen, the Kent Law School of Chicago, and the New York Law School, and in both instances the new schools have flourished from the start, while the old schools have suffered. The new school in Chicago of which Dr. Ewell is dean, began with the name, "The Union Law School of Chicago," but as will be seen by its advertisement on another page of this journal, the name has been changed to the "Kent Law School of Chicago." When the New York Law School was organized, for the avowed purpose of continuing the Dwight method of teaching, the students fairly flocked from the Columbia Law School to enroll themselves in the new school. The old school was reduced to 316 students, while the new school opened with 380 students. The new school grew in popularity as the year progressed, and last June graduated 109 students while the old Columbia College school turned out only 41 graduates. Judging from the newspaper reports, the same thing is occurring in Chicago. The Northwestern school is losing its students and the new Kent school bids fair to outnumber the older school in the attendance of students. The seniors, in particular, are leaving the old school. They are dissatisfied, not only because of the resignation of their popular teacher, Dr. Ewell, but they do not relish the new regulations put in operation by President Rogers. They complain because the evening law classes have been dropped, and all the lectures and recitations take place in the daytime, making it practically impossible for the students to work in law offices. The students, who have left the Northwestern school, take such a warm interest in their new school that they "button-hole" old class-mates, and use every effort to induce them to join the new Kent school. At the time of writing the Northwestern school had enrolled 92 students, while the young institution had acquired 125. This seems to indicate that Dr. Ewell's school will out-rank in popularity the re-constructed Northwestern law school. We reviewed in the August number of the *MICHIGAN LAW JOURNAL*, the causes that led to this unfortunate split. We then said that, if the facts were as stated by Dr. Ewell in his letter of resignation, and no refutation of them has appeared in print to our knowledge, he undoubtedly acted wisely in severing his connection with the Northwestern University Law School. The feelings of students in matters of this kind may generally be taken as a fairly accurate indication of the merits of the case, and if we are to judge by the numbers that have enrolled themselves in each school, Dr. Ewell's position has been amply vindicated. As we have heretofore remarked, this unfortunate affair is to be deplored, but, although it has resulted in two law schools in Chicago, where there was but one before, it seems that each school will enjoy its share of patronage. As the great and growing metropolis of the west, Chicago is the Mecca of western lawyers, and if New York can support two successful law schools, so can Chicago.

WHEN the two great political parties of the country hold diametrically opposed views concerning the constitutionality of such a vastly important measure as the tariff law of 1890, known to the daily press and to the politician as "the McKinley bill," it seems to us that it is within the province of the legal journals of the country to discuss the question, but of course from a strictly non-partisan standpoint. The legal journal has no business with partisan politics. The legal editor is but human, and the chances are, if he trespasses beyond the legitimate limits of the legal questions involved in a discussion of the constitutionality of the principle

of protection, that he will permit himself to be misled into the making of assertions which should find a place only in the partisan press, whose particular business seems to be to uphold the principles of its own party under any and all circumstances. That this question is not a one-sided one is evidenced by the fact that the two political parties, which have taken such clearly defined opposed positions, are almost equal in numerical strength. In fact, according to the vote cast in the presidential election of 1888, one political party exceeded the other by only eight-tenths of one per centum of the total vote cast, or one party cast only 95,000 more votes than the other, in a total vote of eleven million. This is wonderfully close. It is well, perhaps, for the permanence of American institutions that it is so. Although it is well settled that the two political parties disaffirm, and on the other hand affirm, the constitutionality of a protective tariff, it is not so apparent what the opinions of the lawyers, of either party are, as lawyers and not as politicians. The platforms of political parties are their creeds. They are usually prepared with great care and deliberation, in advance of the national conventions. They are the well-considered declarations of the leaders of the party, who will in the event of the success of their party, shape legislation in accordance with their platform. Both parties this year have sharply defined their positions on this question of the constitutionality of a protective tariff. The democrat platform says: "We denounce republican protection as a fraud, a robbery of the great majority of the American people for the benefit of the few. We declare it to be a fundamental principle of the democratic party that the Federal Government has no constitutional power to impose and collect tariff duties, except for the purposes of revenue only, and we demand that the collection of such taxes shall be limited to the necessities of the government, when honestly and economically administered." This, stripped of the useless verbiage and heated adjectives of the politician, means simply that in the opinion of the democrats of the country all measures, whose object is to impose tariff duties for the purpose of keeping out, in some degree, foreign products, for the purpose of encouraging home production, are repugnant to the constitution of the United States. The republican platform is just as emphatic in its adherence to the contrary view. It says: "We reaffirm the American doctrine of protection. . . . We believe that all articles which cannot be produced in the United States, except luxuries, should be admitted free of duty, and that on all imports coming into competition with the products of American labor, there should be levied duties equal to the difference between wages abroad and at home." In other words, the republican party proposes to levy duties for the protection of American industries, irrespective of the fact whether the taxes collected are "limited to the necessities of the government" or are in excess. It will be observed, therefore, that this is an issue upon which neither party can "hedge." A protective tariff must be either constitutional or unconstitutional. Which is it? It is the purpose of THE MICHIGAN LAW JOURNAL in the near future to present both sides of this controversy in its strictly legal aspect by means of articles from the pens of prominent lawyers.

EXIT "GERRYMANDER."—The courts have been called upon very frequently this summer to pass upon questions of a semi-political nature. In this state, the constitutionality of the bill providing for the election of presidential electors by districts, known as the "Miner Law," came before

the Supreme Court. Partisan politics is responsible for the legal attacks upon legislative apportionment acts in a number of states. These acts have been declared unconstitutional because they violate that provision of the state constitutions requiring the apportionments to be made according to population, and because of other minor imperfections. The principle of the "gerrymander" is utterly and entirely wrong. It is not democratic, in the larger meaning of that word, and the better sense of both political parties condemns it. It is an expedient of a minority to rule the majority or of a slender majority to clinch its hold. It has grown to considerable proportions because one of the political parties introduced it and obtained an unfair advantage over the other, which forced the other party to retaliate at its first opportunity. It is difficult to predict to what extent the practice would have continued if the courts had not stepped in and put a stop to it, thus affording another excellent illustration of the wisdom of the framers of our form of government with its system of effective checks.

The war against the "gerrymander" began in Wisconsin. The supreme court of that state declared the apportionment act of 1891 (Laws 1891, Chap. 482) void, the case being *State v. Cunningham*, 51 N. W. Rep., 724. Four reasons were assigned by the court: (1) That the provisions of article 4 of the state constitution, regulating the apportionment "according to the number of inhabitants," and providing that the districts be formed of "contiguous territory," were mandatory and not subject to legislative discretion; (2), that section 4, article 4, prohibited the dividing of counties so that a part should be in one district and the remainder in another; (3) that section 3, article 4, requiring the apportionment to be "according to the number of inhabitants" was violated by the gross inequalities in the population of the districts under the new apportionment; and (4), that the whole act is void, if one or more of the districts are unconstitutionally apportioned. The legislature met and passed another apportionment act, and this, too, was immediately attacked on the ground that it failed to observe the constitutional provision requiring that the districts created be of as nearly equal population as practicable. The attorney-general of Wisconsin refused to bring the suit in his name, so it was brought in the name of the state by an elector of Dane county as relator. The defense is based solely upon the ground that the suit was improperly brought. At the time of writing no decision has been rendered. In Michigan the legislative apportionment act of 1891 was attacked in two cases, one on the relation of a private citizen (*Giddings v. Blacker*, 52 N. W. Rep., 944), and the other by a board of supervisors (*Board of Supervisors of Houghton County v. Blacker*, 52 N. W. Rep., 951), both being against the secretary of state. The first case was brought to test the senatorial apportionment and the latter the representative apportionment. Both opinions decided that the acts, both of 1891 and 1885, were unconstitutional. *Giddings v. Blacker* decided that the discretion of the legislature was not absolute, that the suit could properly be brought by a private citizen as relator, that the inequalities of apportionment rendered the acts void, and that the notices of election must be issued under the act of 1881. A writ of mandamus was issued restraining the respondent from issuing the notices under the act of 1891. *Board of Supervisors of Houghton Co. v. Blacker* decided that under article 4, section 3, of the Michigan constitution, counties could not be divided, unless entitled to two or more members. Houghton county was divided and the whole of the acts of 1891 and 1885 were declared unconstitutional. New York State was next the scene of an attack upon the "gerrymander." Justice Rumsey, in

special term of the supreme court of the third judicial department of New York State, declared the apportionment act of 1892 unconstitutional, and his decision was affirmed by the general term of the supreme court. The decision rested upon two grounds: First, that the act was passed at the same session and by the same legislature under whose direction the enumeration was taken; and second, that the apportionment was unequal and unjust. Section 4, article 3, of the constitution provides that an enumeration of the inhabitants of the state shall be taken under the direction of the legislature in the year 1855, and at the end of every ten years thereafter, and that the senatorial districts shall be so altered by the legislature at the first session after the return of every enumeration that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and persons of color not taxed, and shall remain unaltered until the return of another enumeration. Section 5 provides that the legislature at its first session after the return of every enumeration shall apportion the members of the assembly among the several counties of the state. The legislature of 1885 passed an act providing an enumeration. This act met with an executive veto, and nothing further was done looking to an enumeration until the session of 1892—seven years after the decennial year 1885—when an act was passed which provided for the taking of a census, and required the Secretary of State to tabulate and arrange the returns of the enumerators, and report the same to the legislature. An enumeration was made, and on the 21st day of April the Secretary of State made a report to the legislature of the result of such enumeration. On the day of the opening of this report, and while the legislature was still in session, the Governor, by special message, called an extraordinary session of the legislature, to convene on the following Monday, April 25, 1892. The legislature adjourned *sine die* on April 21, and again convened on the day designated, and on the 30th day of said month passed, and on the same day the Governor signed the act, chapter 392, aforesaid. This last session was decided not to be the next after the taking of the enumeration, but was in fact the same session, and the apportionment law was, therefore, declared void. In Indiana the courts were appealed to to overthrow an inequitable apportionment law. The "gerrymander" has been rebuked there, in the intermediate courts, upon the same general grounds as in Wisconsin, Michigan and New York. The same inequalities of representation exist in New Jersey, and, although the matter is being discussed there, no action has yet been taken in the courts.

Thus it will be seen that in four of the largest and richest commonwealths in the union, the attempts of partisan politicians to nullify a provision common to most if not all state constitutions, a provision which is the very rock bottom of our system of government, have been effectually checked by that branch of our tripartite government, the judicial department. The very basis of our governmental institutions is equality of representation, and any political party or any set of intriguing demagogues in a political party, which "carves up" a state so that a minority, animated by fraudulent and corrupt motives, predominates over a majority, strikes at the very root of political freedom, and imperils the permanence of a government by the people. Fortunately the courts stand in the way, and the people of the state of Michigan may congratulate themselves that the supreme court of this state has contributed in no small degree to the overthrow of the "gerrymander."

[Since writing the above, the Supreme Court of Wisconsin has decided the second apportionment unconstitutional on the same grounds as the first.]

OBITUARY

CHARLES STUART DRAPER.

Hon. Charles Stuart Draper died August 6th, 1892, on board ship, returning from the continent of Europe. His body was brought to Pontiac, the place of his birth, and the residence of his father, where he was buried on the 15th of the same month. His health was not good during the early months of the year, but, while he was able, he continued at his professional duties until June, when, by the advice of physicians he sailed for Carlsbad, hoping thereby to regain health. His wife accompanied him, but, as his health continued to fail, later she was joined by Hon. H. S. Conant, and, later, by his brother, Warren Draper. Receiving no benefit and gaining no strength it was thought best to attempt the journey home, but the first day on ship-board proved his last on earth. Mr. Draper was born August 27, 1841, was admitted to the Michigan University at the age of 19 years. Upon the breaking out of the war in 1861 he left the University for the army, first serving as a lieutenant and afterwards as captain. He was severely wounded at Antietam, and, by reason of disability, resigned from the service March 19, 1863. Upon his return he again entered the University, and remained until he graduated with honor. He studied law with his father, and was admitted to the Bar in Oakland County in 1865, and, after brief experience in several different localities, decided in 1870 to make Saginaw his home, where, with Mr. O. F. Wisner, under the firm name of Wisner & Draper, he continued in the practice of his profession until compelled by loss of strength to cease his labors. Mr. Draper was a republican in politics, and, at the time of his death, held the office of Regent of the Michigan University. As a lawyer Mr. Draper took high rank—his father and his grandfather were lawyers before him—he was educated in a legal atmosphere, and the basic principles of the law found early and permanent lodgment with him. He had the capacity of presenting his case before a jury, or before the court, in its strongest possible light, and, with rare eloquence. In his practice, with the court, with the jury, with witnesses, and with his brother lawyers, he was ever courteous, kind and gentlemanly. He had rare powers of observation and perception, and possessed a happy faculty of impressing most favorably everyone whom he met. In court he was firm, for the case in hand, but when the contest closed there was no bitterness, no anger, and even those against whom he had contended most firmly could cherish no resentment. His early death is universally mourned, as is attested forcibly by the resolutions adopted by the bar at Pontiac, at Saginaw, and elsewhere.

W. L. Webber.

EBENEZER S. EGGLESTON.

The death of Ebenezer S. Eggleston, at Parma, Jackson Co., Mich., on the 29th of August last, removes another distinguished lawyer from the ranks of the older members of the Kent County bar. For over forty years he had been a familiar figure in the courts of Western Michigan and the Supreme Court of the state. He was born at Batavia, New York, May 12,

1825. The out-of-doors life and work on a farm, where his early years were spent, gave him a vigorous constitution, which the arduous labors of a long and active career had not impaired. In 1837 he removed to Litchfield, Hillsdale County, Mich. After finishing his education in the public schools he studied law and in January, 1851, located in Grand Rapids, then a place of less than three thousand inhabitants, and from that time until his death, with the exception of the interval between 1861 and 1865, during which he served with distinction as United States Consul at Cadiz, he devoted himself to the practice of his profession.

On his arrival at Grand Rapids he was offered a desk in the office of the late Justice Martin and together they pursued the study of the law. The acquaintance then formed soon ripened into a strong attachment, which continued until the death of the former. He was admitted to the bar in 1852 and his success in the management and trial of cases entrusted to him soon gave him prominence. In 1856 he was elected prosecuting attorney of Kent County, filling that important office with great credit, at a time when the county was overrun with the lawless and vicious classes, which usually infest new countries. He was elected representative in the legislature in 1872 from the first district of Grand Rapids. But it was at the bar rather than in politics that he found a field more suited to his tastes. His long experience had ripened him into a lawyer well equipped for every emergency likely to arise in a hotly contested law suit. It may be truthfully said of him that he was a polished gentleman, a delightful companion, a thorough scholar, a profound lawyer, a safe counselor, a powerful antagonist. A more fitting tribute cannot be paid to his memory than to quote from his own words addressed to the supreme court on the occasion of the presentation to that court of the portrait of the late Justice Martin, "He loved the law—he loved the study and application of its principles. He loved it because of the grandeur and loftiness of the principles it inculcated. He loved the system because it is based upon principles eternal, as are truth and justice, principles eternal as God."

Reuben Hatch.

LEONARD A. WARD.

Leonard A. Ward, one of the most promising and able among the younger members of the Kent County bar, died at his home, No. 176 S. Union St., in Grand Rapids, Michigan, September 8, after an illness of nearly seven months. He was a son of William W. and Caroline E. (Tillotson) Ward, and was born in Vergennes Township, Kent County, Michigan, May 13, 1854. He belonged to a family of six children, three brothers and two sisters, all of whom and his father reside in Kent County. His mother died in March, 1891. Soon after his birth his parents removed to a farm in the adjoining township of Ada, where all his boyhood days and early manhood, till he was twenty-two years old, were passed except about two years spent with an aunt at Horicon, Wisconsin. His education was obtained entirely in the district school of his neighborhood and by private study and research.

At the age of nineteen he began teaching in a district school which he continued very successfully during each winter for several years, working on the farm during the balance of the year. Thus by teaching and study he obtained a good English education as a foundation for his later professional studies. A severe sickness when a boy of about fifteen left him with a delicate constitution, and after he attained his majority, feeling that the labor and exposure of a farm was too severe for him, he determined to

adopt the profession of law, and at the age of twenty-two came to Grand Rapids and entered the office of the late Judge Isaac H. Parish as a student, where he devoted himself vigorously to the study of law, still continuing to teach school each winter to pay his expenses, till November 4, 1878, when he was admitted to the bar.

He continued in various offices, reading and earning what he could for about three years, and in 1881 opened an office in the Twamley Block, taking his brother Charles into his office as a student to read law and after his admission to the bar, in 1884, he took him into partnership under the name of Ward & Ward, which continued till the time of his death. They have built up a fine practice and have had several cases of importance and considerable local interest.

He was married on February 10, 1881, to Miss Ella Bacon, who is thus early deprived of his companionship and protection. With her counsel and assistance he had recently built and tastily furnished a cozy little home, where all their friends were always sure of a hearty welcome. With a warm heart and of a genial disposition he attracted to himself friends both in his social and business relations.

In politics he was always a republican and took an active part for the success of his party. In 1886 he was nominated for state senator but was defeated with the rest of the ticket by a very small majority. He again was nominated for police judge in 1890, but again suffered defeat with his party. On February 13, 1892, he was attacked with *La Grippe* which was soon followed by inflammatory rheumatism and that in turn was soon followed by aphasia which eventually caused paralysis, the immediate cause of his death. Thus, a young man just in the prime of life, with high ambition and lofty purposes, having struggled against many adverse circumstances, pre-eminently a self-made man, having himself earned everything he ever obtained, modest and retiring in disposition, but persevering and aggressive in carrying out his purposes, is called from his toils and labors here, just as he was beginning to realize the dream of his life. Truly, "In the midst of life we are in death."

William J. Stuart.

ISAAC H. PARISH.

Isaac H. Parish, ex-judge of the Superior Court of Grand Rapids, Mich., died in Chicago on the 13th day of August last, and was buried at Grand Rapids on the 15th day of September. He was born on a farm in Ontario County, New York, April 2, 1826. His father died when he was less than six years old. His mother remarried when he was nearly eight years old and emigrated with him into the wilds of Michigan near Farmington.

His early education was obtained at a log school house some distance from his home, which he attended each winter. After awhile he attended for a short time a sort of an academical institution or high school in Pontiac. This constituted all the learning he obtained at schools, but with his ability to learn and desire for knowledge he made much of it. Several years before commencing it he had firmly made up his mind to eventually study law. When twenty years old an opportunity to clerk in a country store near his home was given him. He worked there some two years satisfactorily, endeavoring to master every detail, believing the knowledge would help him in the practice of law. He left the store to study law with (I think) Green & Stevens, of Farmington. He remained there but a short time studying diligently when Michael Crofoot, then a brilliant and

prominent young lawyer of Pontiac, proffered him a clerkship in his office with sufficient pay to support him, and a good opportunity for study, which he gladly accepted. In 1848 he was admitted to the bar by the Supreme Court at Detroit. After his admission he was received into copartnership by Mr. Crofoot, and they remained together several years. In the meantime he married. In 1855, discovering that the practice of law there was not very lucrative to him, he accepted an opening to go into law and lumbering business at Manitowac, Wisconsin, where he remained until about 1857, when his business proving less lucrative than he had expected, he went to Milwaukee and practiced law two years. Not yet satisfied with its rewards he sought and got an opportunity of working as chief clerk in the office in Chicago, of "Whispering" Smith a noted collection lawyer who employed a large corps of assistants, usually promising young men. At this time the distinguished lawyer, orator and politician, Emory Storrs, was also working there attending to court work and outside business. Mr. Parrish's connection with Smith was severed sometime in 1861. He then came to Grand Rapids, where he hung out his shingle. But business was then poor and clients few, so he obtained temporary employment as an assistant bookkeeper for a part of each day in Sweet & Co's. Banking house which afterwards became and is now the Old National Bank.

When the Western District of Michigan was organized, Lewis Porter, a clothier, was appointed clerk of both the U. S. Circuit and District Courts of that District. He had no knowledge of the duties of the office and only appeared in those courts on show occasions, on all other occasions the business was transacted by his trusty deputy, Mr. Parrish, who received all of its emoluments for his compensation.

In May 1863, Mr. Porter resigned and Mr. Parrish was appointed clerk of both Federal Courts, which offices he retained until about 1876.

He resumed the practice of law again at Grand Rapids, still retaining the position of commissioner in the United States courts to which he had been appointed at the formation of the District, and for one year of the time was employed in the office of Blair, Norris & Kingsley.

In the spring of 1881 he was elected judge of the Supreme Court on the republican ticket, defeating Judge John T. Holmes, then its judge. At the end of the term of six years he failed to receive a renomination and soon after went to a village in the immediate suburbs of Chicago, but did not resume the practice of law. He lived there very quietly until he was stricken by apoplexy and died at the age of 66 years.

George H. White.

MICHIGAN STATE BAR ASSOCIATION.

The following letter, signed by Edward Cahill, President, and Ralph Stone, Secretary, of the State Bar Association, has been addressed to the lawyers of the state:

The Michigan State Bar Association is now in the second year of its existence. At a meeting held in the city of Detroit, on February 22, 1890, it was determined to form a State Bar Association, and organization was perfected on June 2, 1890. The membership at that time numbered 237, to which at the recent annual meeting, held at Grand Rapids, only twenty-five names were added, making a total membership, at the present time, of 262. It is the purpose of this letter to call your attention to the fact that you are not a member of the association, and to urge you to join it at once. The objects of the association, as expressed in the original call, are, "the advancement of the science of jurisprudence the promotion of the administration of justice, uniformity of wise and just legislation and the upholding of the honor of the profession of the law, and the encouragement of cordial intercourse among the members of the Bar of this state." Your name should be placed on the membership roll, and you are earnestly requested to urge those members of the bar in your locality, who are not already members, to join. Kindly send your name to the secretary, Ralph Stone, 829-831 Michigan Trust Co. Building, Grand Rapids, Mich., for submission to the Board of Directors for election to membership.

STANDING COMMITTEES.

President Cahill has made the appointments to the standing committees of the State Bar Association as follows:

Jurisprudence and Law Reform.—Thomas J. O'Brien, Grand Rapids; George F. Robinson, Detroit; Alfred J. Mills, Kalamazoo; John C. Patterson, Marshall; George W. McBride, Grand Haven.

Judicial Administration and Remedial Procedure.—Henry C. Wisner, Detroit; Niram A. Fletcher, Grand Rapids; Herschel H. Hatch, Bay City; Charles R. Whitman, Ann Arbor; Harrison Geer, Lapeer.

Legal Education and Admission to the Bar.—Alexander R. Avery, Port Huron; Philip Padgham, Allegan; James H. Campbell, Grand Rapids; Floyd R. Mechem, Detroit; William D. Totten, Kalkaska.

International Law.—Otto Kirchner, Detroit; John W. Champlin, Grand Rapids; Benton Hanchett, Saginaw; Edwin M. Irish, Kalamazoo; Hoyt Post, Detroit.

Publications.—Harry D. Jewell, Grand Rapids; Alexis C. Angell, Detroit; Lorenzo T. Durand, Saginaw; Mason D. Chatterton, Lansing; Benjamin F. Heckert, Paw Paw.

Grievances.—Elisha A. Fraser, Detroit; Watts S. Humphreys, Saginaw; Hugh P. Stewart, Centreville; Reuben Hatch, Grand Rapids; Arch B. Eldredge, Marquette.

NOTES OF LATE MICHIGAN DECISIONS.

DWELLING HOUSES, WHEN PERSONAL PROPERTY.—It is often difficult to draw the line between a real and chattel fixture. The question arose in a somewhat novel way in *Michigan Life Ins. Co. v. Cronk*, (July 27, Montgomery, J.) Defendant secured certain land upon an ordinary land contract and built a house upon the same. Default was made by him and plainly terminated the contract and required him to surrender possession. Defendant moved the house upon lands of a third party across the street. After demand the plaintiff brought replevin and the circuit judge directed a verdict in his favor. Defendant assigned two grounds as error. (1) That replevin would not lie because the house had become a fixture upon the land to which it had been moved and was therefore real estate; (2) that as the house was occupied as a homestead by the defendant and his family the wife was a necessary party. The court denied both these claims, holding that the house had become part of the realty on the land contracted for as soon as erected, and when severed by the defendant became personal property, and replevin would lie; and the house remaining personal property in the wrongful possession of defendant, no homestead right attached.

TITLE BY ADVERSE POSSESSION.—Instances in which title to land is required by adverse possession are becoming so rare, that the case of *Clark v. Campau*, (July 28, McGrath, J.) possesses peculiar interest. The land is situated along the Detroit river, being marsh land, originally used as fisheries. Certain land was deeded to Clark and Gillett, in 1845, and in 1852, Gillett quit-claimed to Clark. The first deed was lost and the description in the quit-claim deed denominated the land as "Stony Point Fishery," "Grassy Point Fishery" and other fisheries. Clark used these fisheries and paid the taxes upon the whole 118 acres, from 1852 to 1867, when he abandoned the fisheries. In 1866, one, Howard, deeded the 118 acres to Campau. There is abundant evidence in the case showing that Campau, had asserted ownership from 1866 to the time of bringing suit, had paid the taxes, used the land, and gave permission to pasture upon it, and that Clark, during that time had failed to occupy the land or to assert or test the title to it. Accordingly the Supreme Court decided that the title of defendant had been established by continued, open, notorious and adverse possession for more than twenty years. *Murphy v. Doyle*, 37 Minn., 113.

LOCAL OPTION LAWS—AMENABILITY OF DRUGGISTS—COMPETENCY OF STATE'S WITNESSES.—Two or three interesting points relative to the local option laws recently passed in this State were discussed in *People v. Murphy* (July 28, Montgomery, J.) The defendant, a druggist, was charged with having sold liquors without first procuring a druggist's license, but the case was brought under the provisions of Act No. 207, Pub. Acts 1889, the people of Van Buren county having voted, in accord-

ance with that act, to prohibit the sale of intoxicating liquors, etc., within the limits of that county. His counsel insisted that the offense, if committed, was a violation of the general laws and not of the special local option laws, basing his claim upon the following proviso, contained in a certain section: "Provided, however, that the provisions of this section shall not apply to druggists or registered pharmacists, in selling any such liquors in compliance with the restrictions and requirements imposed upon them by the general laws of this State." It was argued that the instant it appeared that the defendant was a druggist the case was subject to the above proviso, and could not be tried under the special act. This theory the court very consistently denied, holding that the respondent not having taken out his druggist's license as provided by the general law, had not brought himself under it, and was not excepted from the provisions of the special act. The respondent's counsel also claimed that if the prosecution was brought about by the main witness for the state being sent to procure the liquor for the purpose of prosecuting respondent and convicting him the prosecution could not be sustained. But the court held that though this might be a circumstance affecting the credibility of the witness' testimony, yet even were the witness equally culpable with the respondent it would not justify a violation of the law by the respondent. A new trial was granted in this case however, because of a failure to carry out some technical provisions of the law concerning notice, etc.

CHANGE OF VENUE—RIGHT OF STATE TO SECURE CHANGE OF VENUE IN CRIMINAL CASES AGAINST WISHES OF RESPONDENT.—Is it error for a circuit judge to grant a change of venue in criminal cases upon motion of the counsel for the prosecution against the protestations of the respondent? This was one of the questions before the supreme court in *People v. Peterson* (July 28, Long, J.) Defendant was accused of murder in Delta county, and was twice tried in that county, the jury disagreeing both times. The prosecuting attorney then moved for a change of venue and, against the objections of defendant's counsel, it was granted, and the case tried in Menominee county. Defendant was convicted and sentenced, but asked for a new trial, assigning as error, among other things, the granting of the change of venue to the state over defendant's objections. But upon this point the supreme court held that there was no error in allowing the change of venue in criminal cases, at the request of the prosecution, whether the prisoner consented or not. The question, they hold, rests within the sound discretion of the trial court to judge and determine the sufficiency of the showing for a change of venue, if under the constitution and statutes of the state, the court has the right, without the consent of the respondent in a criminal prosecution to change the venue and transfer the trial into another county from that in which the offense is charged to have been committed. The constitutions or statutes of some states expressly provide that the trial shall be held in the county where committed. Such is not the case in Michigan. The constitution simply provides (Sec. 28). "In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury." Inasmuch as there is no constitutional provision fixing the vicinage within which the trial must be had, the court held that the rule of the common law must prevail unless changed by statute, and that under its common-law powers the circuit courts have the right, upon cause shown, to change the venue upon application of the people. In support of this theory they cite

People v. Webb, 1 Hill (N. Y.) 179; *People v. Baker*, 3 Parker, C. C., 181; 1 Bish. Crim. Proc. §113. The question is an interesting one, especially in this state as this is the first time our courts have been called upon to decide it.

SUPPRESSION OF TESTIMONY.—An interesting point is raised in *People v. Kenyon*, decided July 28, opinion by Chief Justice Morse. The case, one of assault and battery, was before the Supreme Court on a number of assignments of error. The people rested their case without calling one, Marie Gould, as a witness. She was sworn as a witness for the prosecution in justice court, and it is claimed saw part of the affray. The defendant moved that the prosecuting attorney be requested to call Mrs. Gould. The circuit judge declined to do so, upon the ground that he had no power to compel the people to call her. Chief Justice Morse says, "If she saw any portion of the trouble she should have been sworn as a witness by the prosecution, and the court had power to compel them to do so. The witnesses to the affray outside of Mrs. Gould were simply Miller and his son and the respondent and his wife. Mrs. Gould was therefore an important witness and one to be produced by the people." *Thomas v. People*, 39 Mich., 309. In this case, cited by the chief justice, Judge Cooley decides that a witness, having been subpoenaed, the prosecution should put him on the stand where it is presumable that he could give important evidence not otherwise obtainable. The prosecution in this case, claimed that the testimony of the witness would have been only cumulative, but Judge Cooley was of the opinion that, inasmuch as the witness was the only one, besides the actors, who saw the affray, his testimony could not be suppressed, and the defence were entitled to have the prosecution call him. But the most suggestive feature of this question is the duty of the prosecuting attorney in the premises. It may truthfully be said of many prosecuting attorneys that an ambition to make a name for themselves as successful prosecutors often blinds them to their true duty. They either misapprehend or lose sight of what the public character of their office requires of them. In the case of *Hurd v. People*, 25 Mich., 416, where it is decided that all the witnesses present at the transaction should be called by the prosecution before the prisoner is put to his defense, if such witnesses be present or clearly attainable, Chief Justice Christiancy, with great clearness and unmistakeable emphasis, points out the duty of the prosecutor, as follows: "The only legitimate object of the prosecution is to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence. The prosecuting officer represents the public interest which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success." In the case of *Maher v. People*, 10 Mich., 228, the court decided that it was the duty of the prosecution to call a material witness, even though he should testify to a portion of the transaction which ill-suited the theory of the prosecution. In *Wellar v. People*, 30 Mich., 22, the name of one of the two witnesses who saw the affair, was endorsed upon the information, but the prosecuting attorney failed to call him, and it was held by the court that it was necessary at least to have him in court ready to be examined. The English rule goes so far as to require the prosecutor to produce all present at the transaction, though they may be near relatives of the prisoner. *Chapman's Case*, 8 C. and P., 559; *Orchard's Case*, id., note; *Roscoe's Cr. Ev.*, 164.

BOOK REVIEWS.

THE ELECTRIC RAILWAY.—By Oscar T. Crosby and Louis Bell. New York: The W. J. Johnston Co., Limited.

Scarcely a law reporter or a law journal can be picked up now-a-days, but what contains one or more cases in which an electric railway company is a party. The law of electricity, as applied to the electric railway, is increasing in volume every day. Almost every state supreme court in the Union has been called upon to decide questions arising by reason of the introduction of the electric motor as the motive power upon the street railway. Very few lawyers in the country are competent to conduct these cases intelligently because of a lack of technical knowledge of the principles of electricity which govern the construction and operation of the electric railway. This work by Mr. Crosby and Dr. Bell supplies the lawyer with everything necessary to know in order to prosecute an electric case intelligently. It is a discussion of general principles, methods, and results, and is written so that the layman can understand the subject thoroughly. The most valuable feature of it for lawyers is the appendix on the decisions of the electric railway versus the telephone. The most interesting chapters are those upon general electrical theory, motors and car equipment, storage-battery traction, commercial considerations and historical notes.

R. S.

STOCK AND STOCKHOLDERS.—By William W. Cook, of the New York Bar. Chicago: Callaghan & Company.

This is a most comprehensive and modern work. It is not only a treatise upon the law relating to stock and stockholders, but it also contains a number of new subjects and principles, so as to make the book a complete work on corporation law. The dedication of the book attracted our attention. It is a very graceful tribute to Michigan's great jurist and teacher, Judge Cooley. It is worth reproducing. It is as follows: "To the Honorable Thomas M. Cooley, LL.D., professor, author, and judge, whose pre-eminent ability, untiring research, profound learning and exalted character have secured for him an imperishable fame as a jurist, under whose instruction the author acquired a desire to search out and master the principles of the law, this work is respectfully dedicated." Mr. Cook in preparing this work, proceeded upon the theory that he who understands the rights, duties, powers, and liabilities of stock and stockholders, will have little difficulty in understanding the nature of corporations, the powers of corporations, the *status* of corporate creditors, and the various peculiarities of corporation law. The main difficulty in understanding corporation law is due largely to the method of studying the subject. A complete exposition of the law of stock and stockholders, is a complete exposition of the law of corporations. The plan of the work, therefore, is original. The work is in its second edition.

R. S.

MICHIGAN LAW JOURNAL.

VOL. I.

NOVEMBER, 1893.

No. 10

THE AMERICAN MUTUUM.

PROF. J. C. KNOWLTON.

The delivery of goods that may be accurately designated by number, weight or measure, such as corn or wine, on an undertaking that goods of like kind and quality shall be returned, creates what is known in the civil law as the contract of mutuum, a kind of bailment contract. Text writers on the common law regard such a transaction as a sale and not a bailment. "Where there is no obligation to return the specific article, and the receiver is at liberty to return another thing of equal value, he becomes debtor to make the return, and the title in the property is changed—the transaction is a sale." Benjamin on Sales, p. 5, n. 1. In such a case if the property delivered "is lost or destroyed by accident, it is the loss of the borrower, for it is his property." Story on Bailments §283; Schouler on Bailments p. 5. These propositions have long been elementary, but the courts have experienced much difficulty in applying them; and it may be said, that in view of recent decisions, the propositions are too broadly stated. Many cases have come before the courts wherein the contracts between the parties called for the return of other property than that delivered, but of like kind and value, which have been regarded as bailment contracts.

We do not purpose reviewing the numerous cases upon the question. This was exhaustively done in a note to *Chase v. Washburn*, 1 Ohio (N. S.) 244; 6 Am. L. R., 450 (1871). An examination, however, of some of the cases decided in the past few years on the law of grain in storage may be of interest. In the northwestern states where grain is so generally stored in warehouses, and under various stipulations, the courts have been frequently required to pass upon what Judge Story calls "the innominate contract." Contracts of storage are decidedly variant, and the rights of the parties almost always depend upon the circumstances of the particular case; but we can easily group those cases which have in common the conditions essential to the principle under consideration.

1. Where property is delivered upon an agreement that the identical property is to be returned, although in an altered form, as wheat changed to flour and brand, the contract is a bailment; but where the return is to be the product of other property, though like in kind and value, there is,

generally speaking, a sale, and property in the thing delivered passes to receiver with all the rights and responsibilities of ownership.

In *Woodward v. Seamans*, 125 Ind., 331 (1890), the defendants conducting a warehouse and flour mill, received of plaintiff a quantity of wheat, agreeing to return a designated amount of flour and brand when called on to do so. The flour and brand was to remain in the possession of defendants and was not expected to come from the wheat delivered. Before all the flour had been returned the mill and its contents were accidentally destroyed by fire. Suit was brought to recover the value of the grain deposited, and the court held that the defendant was liable on the ground that the contract was a sale of the wheat. Elliot, J., said: "There is here no agreement to restore the identical property; only to restore to him property of like quality; nor is there any agreement to restore to him the product of the property. The agreement is to yield property in exchange for property, and this is essentially a contract of sale." *Mallory v. Willis*, 4 N. Y., 76; *Carlisle v. Wallace*, 12 Ind., 252; *Smith v. Clark*, 21 Wend., 83.

Strictly speaking the agreement was to yield property in exchange for the product of other property, and in this respect these cases are to be distinguished,—if there is anything in the distinction—from those which hold that there may be in certain kinds of property a bailment, even though the property is delivered on the understanding that the bailment purpose may be performed by the return of an equivalent.

If A should deliver his horse to B under the agreement that B should return on demand fifty cords of wood, it would not be suggesting that there was anything in this resembling a bailment; so there is force in the statement that in bailment law, where the return is to be in the product of the thing delivered, it should be the product of the identical thing and not of some equivalent. But this proposition seems to be subject to qualification.

In *Bretz v. Diehl*, 117 Pa. St., 589 (1888), several persons deposited wheat with a miller, taking receipts to the effect that the wheat was received for their use. The wheat of the several parties was stored in a bin, and from the commingled mass flour was ground, which the depositors were to receive or which was to be sold on their order. Some of the flour was attached by the miller's creditors. On the trial the question was as to whether the transaction was a sale or bailment. The trial judge charged the jury, "where one takes wheat to a mill, and with his consent it is put into a common mass with the wheat of other customers, with the understanding that he shall not get the same wheat back, but other wheat from the commingled mass, *or flour or other product from the same mass*, this too would be a bailment and not a sale; and this would be so, even with the knowledge of the depositor that some of the miller's wheat was also mingled with his and that of other customers. In such case the property remains in the depositors, and the transaction is a bailment." This

charge the supreme court sustained, and to the same effect are some of the cases cited below.

2. If property having a market value is delivered on the understanding that it is to be consumed, and that the receiver is to pay the depositor the market price for the same kind and quality of property when requested to do so, the property is sold upon its delivery. There is no bailment, for the reason that the right to demand a return is not reserved.

In *Reherd v. Clem*, 86 Va., 374 (1889), a miller receipted for wheat as placed in store. He was "to pay market price of same quality of wheat whenever Mr. Reherd wants to sell the same." The wheat was destroyed by accidental fire. It was held that the miller had title to the wheat, and he was required to sustain the loss. *Jones v. Kemp*, 49 Mich., 9; *Woodward v. Boone*, 126 Ind., 122; *Lyon v. Lenon*, 106 Ind., 567; *Richardson v. Olmstead*, 74 Ill., 213.

3. So far the law is clear and simple; but the extensive use of elevators for the storage of grain has called for a new application of old principles, and for some modification of the doctrine that there is no bailment where the agreement is to return not the identical property delivered but an equivalent.

Where several depositors have wheat or other grain deposited in a warehouse in a common mass on the understanding that the wheat is not to be sold, but that each depositor shall have the right in the future to demand his share or its market value, the warehouseman is the bailee and not a purchaser of the wheat in store. The depositors retain their property right in the wheat as tenants in common. *Englebrood v. Hammond*, 19 Ohio, 337; *Bretz v. Diehl*, 117 Pa. St., 58; *Young v. Mills*, 20 Wis., 615; *Warren v. Milliken*, 51 Me., 97; *Kimberly v. Patchin*, 19 N. Y., 330.

And in case a deficiency occurs, the loss must be borne by each of the depositors in the proportion which the amount of his wheat bears to the whole amount deposited; and if one of them receives a larger proportion than his share, in view of such deficiency, he is bound to account to the other depositors for such excess. *Brown v. Northcutt*, 14 Or., 529; *Cushing v. Breed*, 14 Allen, 380; *Dole v. Olmstead*, 36 Ill., 150. These cases illustrate the principle that there may be a contract of bailment in which a return of the identical thing delivered or its product is not contemplated. More forcible illustrations, however, come from the next class of cases to be considered.

4. It is the custom of elevators to commingle the grain of various depositors, and draw from the common mass from time to time for shipment and sale, always keeping on hand sufficient quantity to meet outstanding receipts. These receipts usually specify that the grain is received in store, and that the depositor may demand an equal quantity of grain of like value, but not the identical grain delivered. Where a depositor delivers grain to a warehouseman with a knowledge of this custom, when does he lose his right of property and become a simple creditor?

Up to within the past few years most courts held that where grain was delivered under such circumstances, the transaction amounted to a sale of the grain, as soon at least as the warehouseman withdrew the identical wheat from the common mass, and that the depositor had no property right in the substituted grain. *The South Australian Ins. Co. v. Randall*, L. R., 3 C. P., 101; *Willis v. Cooper*, 10 Ia., 565. See cases reviewed in 6 Am. L. Rev., 450, and the dissenting opinion of Rothrock, J., in *Sexton v. Graham*, 53 Ia., 199.

There are recent cases, however, to the contrary, which hold that the transaction continues a bailment until the party having the right to do so elects to treat it as a sale, and that depositors may have a right of property in the substituted grain.

In *Ledyard v. Hibbard*, 48 Mich., 421, wheat had been delivered under the following receipt:

"Received of William P. Ledyard by L. Bruce, 820 bushels number one wheat at owner's risk from elements, at ten cents less Detroit quotations for same grade when sold to us.

"Stored for ——— days.

HIBBARD & GRAFF."

The wheat was stored with depositor's knowledge in bin, together with other wheat received and stored for farmers and others, and from which the firm drew from day to day for the purpose of their business and manufacture as warehousemen and millers. The quantity in the bin changed from day to day as it was depleted by drafts, and replenished by new deposits. Upon Hibbard & Graff's failure and assignment only a small quantity of the wheat delivered by Ledyard remained in the elevators. The wheat was demanded of the assignee, and on his refusal replevin was brought, and wheat equal to the amount delivered was taken from the elevators under the writ. Defendants claimed that the transaction amounted to a sale and not a bailment. The plaintiff recovered, and his recovery was sustained by the Supreme Court. Cooley, J., rendering the opinion said: "If, as warehousemen, they (Hibbard & Graff) gave warehouse receipts for grain received in store, the receipts must be construed by their terms and commercial usage. In commercial circles they would be understood to represent the title to the quantity of grain specified, and though the quantity in store might fluctuate from day to day as grain would be received and delivered out, this would not affect the title of the holder of receipts, who would be at liberty to demand and receive his proper quantity at any time if so much remained in stock; but if the quantity in stock is reduced by consumption instead of by shipment or sale, it is not apparent that the rights of the holder of receipts should be any different. It is true, if the wheat is all consumed and the amount in stock is not kept good, so that a demand for the wheat can be responded to, and if the consumption is by the consent of the owner, express or implied, the consumption under such circumstances may be justly regarded as a meeting of the minds of the parties upon a sale; but so long as grain

is kept in store from which the receipts may be met, a fair presumption is that it is intended they shall be so met, and this presumption would only be overcome by some act unequivocal in its nature. The Circuit Judge instructed the jury that in absence of any election of the plaintiff to take the price, the bailment continued so long as any portion of the wheat deposited by the plaintiff remained in store, and he was entitled to take the quantity specified in his receipts from any that remained in store with which his own wheat had been mingled. The Judge may, perhaps, have erred in attaching importance to the question whether any portion of the identical grain deposited by the plaintiff remained in store; but if so, the error favored the defendant, and they cannot complain of it." We notice here a clear right of substitution recognized and without danger to the bailment relation originally created. The case has been so frequently cited with approval that it may be regarded as a leading case on this subject.

In *James v. Plank*, 26 N. E. Rep., (Ohio), 1107 (1891) wheat was received by a warehouseman under the usual custom, whereby the wheat was mingled with that of other depositors, and the warehouseman sold from day to day from the common mass, always keeping on hand sufficient to meet outstanding receipts. The elevator and its contents were destroyed by accidental fire, and suit was brought to recover the value of the wheat. Defendant claimed that he was the bailee and not a purchaser of the property. The Supreme Court held "if the jury should be satisfied from the evidence that the custom as claimed by defendants actually existed, was known to plaintiff, and, from it and other facts appearing, that the understanding was that, though the wheat might be mingled with other wheats belonging in part to depositors and in part to defendants, yet defendants were to sell from the common mass, from time to time, their proportion only, leaving sufficient on hand to satisfy all depositors, and the defendants observed this understanding; and especially if, in addition to the foregoing, they found further, that the distinct understanding of the parties was, by virtue of such custom, that the wheat was to be regarded as in store until Plank should elect to make a sale of it, then, it appearing that no demand for the property had been made by presentation of receipts, at the office or otherwise, before the fire, the jury would have been justified in finding for the defendants."

In *Sexton v. Graham*, 53 Ia., 181, under facts somewhat similar, it was held that where grain is stored in a warehouse, with the understanding that it may be mixed with other grain of like quality, it passes out of the control of the owners so far as identity is concerned, and they become tenants in common of the entire amount in store of like quality and stored subject to the same conditions, and such tenancy continues although the identity of the entire mass in store may be changed by continuing additions and subtractions. See also *Schindler v. Westorer*, 99 Ind., 395; *Rice v. Nixon*, 97 Ind., 97; *O'Delle v. Leyda*, 46 Ohio St., 244; *Nelson v. Brown*, 44 Ia., 455; *Irons v. Kenter*, 51 Ia., 88.

It is said that in this class of cases much depends upon who has the right of election under the contract for a return in money or property of like quality. In *Lyon v. Lenon*, 106 Ind., 557, Mitchell, J., said: "Where wheat is received under the circumstances supposed, if the dealer has the right, at his pleasure, either to ship and sell the same on his account and pay the market price on demand, or retain and re-deliver the wheat or other wheat in place of it, the transaction is a sale. It is only where the bailor retains the right from the beginning to elect whether he will demand the re-delivery of his property or other of like quality and grade that the contract will be construed to be one of bailment. If he surrenders to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property as stipulated. The distinction is, can the depositor compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale."

Suppose, however, that while the grain is thus held by the warehouseman, under a bailment contract, he wrongfully sells more than his share of the common mass, can the depositors recover the grain so sold from innocent purchasers? At first it would seem that they could, on the ground that they had never given to the warehouseman a title to the property which he could transfer. Such was the view of the court in *Young v. Miles*, 20 Wis., 615, but in *Preston v. Witherspoon*, 109 Ind., 457, where the question was more directly involved, it was held that where one deposits wheat for storage, knowing that it is to be commingled with wheat purchased by the owner of the warehouse, and that the latter is selling and publicly shipping from the common mass, he then confers an apparent ownership and authority to sell, and is estopped to assert title as against an innocent purchaser in the usual course of business. This was ruled upon the familiar principle that "whenever one of two innocent parties must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it."

Under a Minnesota statute providing that a warehouseman's contract of storage of grain should be regarded as a bailment rather than a sale, it was held that if the warehouseman sold wrongfully in excess of his share of the mass in store, his depositors might recover the same from innocent purchasers. Independent of statute, however, the better reason seems to be against such ruling. *Hall v. Pillsberry*, 43 Minn., 33.

From the foregoing cases we reach the conclusion that, in this part of the country, there is a kind of bailment resembling, in one respect at least, the Roman *Mutuum*; that in bailment law there may be a delivery of such goods as can be distinguished by weight and measure and having a market value, on a contract under which a return of not the identical property delivered, either in its original or in altered form, but of other property of like kind and value, is contemplated—such a transaction is not necessarily

a sale; that property may be delivered to a bailee with right of sale or consumption and substitution, that upon a sale of the property by him the title of the bailor is divested and upon substitution of other property of like kind and value, the title of the bailee instantly vests in the substituted property. There can be no objection to a person acting in the double capacity of agent and bailee for the depositor; as custodian of the property and at the same time as agent of the bailor in making sale and substitution. The usages of trade at the present time demand this, and the courts have yielded to the demand. The capacity of parties to make a contract expressing such rights and duties has never been denied, and its existence in many cases is correctly implied from the almost uniform custom which prevails among warehousemen engaged in the storage of grain. The old rule strictly enforced would practically ruin the grain elevator business of to-day. People deposit grain with a warehouseman when they would not accept a personal obligation against him. They rely upon their warehouse receipts, not as evidence of debt, but as evidence of title to property. As a general rule they understand the transaction clearly. They expect the warehouseman to sell the grain and to keep on hand other grain of like kind and quality, and from this they look for their return in grain or its market value as they may demand.

A PROTECTIVE TARIFF, CONSTITUTIONAL.

HON. EDWARD CAHILL.

The question submitted to me is to be discussed as one of constitutional power without reference to the merits of any particular tariff as a fiscal policy. After more than one hundred years of tariff legislation in which the doctrine of protection to home industries has never been wholly ignored, a discussion of the constitutionality of such legislation would seem to come too late.

In construing the constitution, the intention of its framers is, so far as possible, to be ascertained. We are bound, of course, by the language used, but in the interpretation of that language we are required to consult the public history of the time in which it was used. *Bay City v State Treasurer*, 23 Mich., 499. Constitutions are to be construed as the people who adopted them construed them, and to that end "we must take into consideration the conditions and circumstances under which the constitution was framed, the general spirit of the times, and the prevailing sentiments of the people. Every constitution has a history of its own . . . and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it." Mr. Justice Cooley in *People v Harding*, 53 Mich., 485.

If we go back one hundred years in the history of the country and of the world, we find the social and political situation greatly changed. The United States had just become a nation in name, but it lacked most of the conditions that go to make up a free and independent state. Its people were poor and burdened with debts, public and private. Its vast natural wealth hidden in our forests and mines was undeveloped and manufacturing was in its infancy. The people were dependent upon foreign countries for most of the common necessities of dress, household use, and for implements and tools. Under the Articles of Confederation, the states had, and exercised, the right to regulate trade and commerce by the imposition of duties in the interests of their local industries. In every civilized nation, trade, manufactures and the arts were and had been for ages, fostered and promoted by the government. Duties were laid upon imports not only for the purpose of revenue, but as a matter of trade regulation to help their own and hinder other nations. Into such a community of nations, the statesmen of 1787 launched the new government. The constitution then framed took from the states the power formerly exercised by them to regulate commerce, and if it did not grant such power to the general government, then the power was lost altogether. Story on the Constitution, 1079. Would the framers of the constitution be likely to set up a new

government without giving it the same powers of offence and defence commercially as well as politically, as were possessed and had been exercised by rival nations for centuries? It seems improbable.

The legislative power of the new government was vested in Congress (Const. Art. I, Sec. 1) and the general powers of Congress are declared in Sec. VIII of the same Article. So far as such powers bear upon the question, they are as follows:

Sec. VIII. The Congress shall have power:

1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

An examination of the debates of the convention that framed the constitution shows no controversy over these provisions. They seem to have been unanimously agreed to and almost without debate. 2 Bancroft's History of the Constitution, 132.

But in the discussion in the conventions of the several states having under consideration the ratification of the constitution, so far as such debates have been preserved, much prominence was given to the fact that by the new constitution Congress was to have the power to impose duties and to regulate trade in the interest of the infant industries of the new country. Elliott's Constitutional Debates.

In *Veazie Bank v. Fenno*, 8 Wallace, 533, Mr. Chief Justice Chase, in speaking of the provision of the constitution relating to the taxing power, used this language: "More comprehensive words could not have been used The comprehensiveness of the power thus given to Congress may serve to explain at least the absence of any attempt by members of the convention to define, even in debate, the terms of the grant. The words used, certainly describe the whole power and it was the intention of the convention that the whole power should be conferred."

In discussing the extent of the power granted by the constitution to Congress over this general subject, I shall not attempt to separate the two provisions upon which the right of Congress to establish the protective system has been based. They ought to be construed together. At the time the constitution was adopted duties were frequently levied as a regulation of commerce and the power to regulate commerce was commonly exercised by the imposition of duties. The right to regulate commerce was an express grant of power which included the power to lay duties upon imports and more, but it removed whatever doubt existed of the complete authority of Congress over the subject of foreign trade. The

power to regulate is the power to control, to limit, to destroy. See the Embargo Acts of 1798, 1807, *et seq.*

It must be regarded as somewhat remarkable in view of the present claim that protective tariffs are unconstitutional, that there has been no adjudication of that exact question by the Supreme Court of the United States. It can be accounted for only upon the theory that no one of the active opponents of the system, of whom there have been many eminent lawyers and statesmen, have predicated their opposition upon constitutional grounds, or else that they have not had sufficient confidence in the force of that argument to be willing to present it to the court of last resort. But, from the very nature of things, this power had to be construed by Congress; for when a body is called upon to perform a constitutional duty or to do an act in respect to which it can be supposed the constitution has spoken, the question of construction must at once arise and must be decided by the body called upon to act. Cooley's Constitutional Limitations, 39.

How did the people of that time interpret the power conferred upon Congress by the new constitution? The first petition presented to the House of Representatives, as appears by the Journal of the House, read as follows: "A petition of the tradesmen, manufacturers and others of Maryland whose names are thereunto subscribed, was presented to the House, and read, stating certain matters and praying an imposition of such duties on all foreign articles which can be made in America, as will give a just and decided preference to the labors of the petitioners, and that there may be granted to them, in common with the other manufacturers and mechanics of the United States such relief as in the wisdom of Congress may appear proper." The second petition presented was from the shipwrights of Charleston, S. C., stating the distress they were in from the decline of that branch of business and praying for the passage of such general regulations of trade as would tend to relieve their industry. The third petition presented was from the mechanics and manufacturers of the city of New York, praying for the interposition of Congress in aid of the manufactures of that section. They subjoined a list of such articles as could be manufactured in New York and which they thought ought to be protected. Acting upon these petitions, and on the 8th day of April 1789, Mr. Madison, who had been a member of the constitutional convention, and had had as much to do with preparing that great charter as any other member of that body, introduced a bill having the following preamble:

"Whereas it is necessary for the support of the government, for the discharge of the debts of the United States and the *encouragement and protection of manufactures* that duties be laid, etc."

This bill was framed in the spirit of its preamble and became a law. In the debate upon it, objection was made by some to the protective features of the bill, but not upon constitutional grounds. The arguments against it were based upon the idea that the protective policy to the extent

sought for in the bill, was unwise. That opinion did not prevail. Between 1789 and 1816, seventeen different tariff bills were passed, each having the protection and encouragement of infant industries in view. The tariff of 1816 modified somewhat the tariff theretofore in force but it retained the protective features. That bill received no abler or more hearty support than that rendered by Mr. Calhoun. II Calhoun's Works, 169.

In this connection and as bearing upon the contemporaneous construction which these provisions of the constitution received, I call attention to the following extracts from the public addresses of Washington, Jefferson, Madison, Monroe, Hamilton and others. President Washington in his message to Congress, January 11, 1790, declares: "That the safety and interest of a free people require that Congress should promote such manufactures as tend to render them independent of others for essential, particularly military supplies." "The advancement of agriculture, commerce and manufactures, by all proper means, will not, I trust, need recommendation." And in his message of December, 1796, President Washington says: "Congress have repeatedly, and not without success, directed their attention to the encouragement of manufactures. The object is of too much importance not to insure a continuance of these efforts in every way that shall appear eligible."

President Jefferson in his message of 1802, states: "To cultivate peace; maintain commerce and navigation; to foster our industries; and to protect manufactures, adapted to our circumstances, etc., are the landmarks by which to guide ourselves in all our relations." In his message of 1808, he says, "The situation in which we have been thus forced, has impelled us to apply a portion of our industry and capital to internal manufacturing improvements. The extent of this conversion is daily increasing and little doubt remains that the establishments formed and forming, will, under the auspices of cheaper materials and subsistence, the freedom of labor from taxation with us, and protecting duties and prohibitions become permanent." In his message of 1818, President Madison says: "It is deemed of importance to encourage our domestic manufactures. In what manner the evils which we have averted to, may be remedied, and how it may be practicable in other respects to afford them further encouragement, paying due regard to the other great interests of the nation, is submitted to the wisdom of Congress." In his message of December, 1822, he says; "Satisfied I am, whatever may be the abstract doctrine in favor of unrestricted commerce, provided all nations would concur in it, and it was not liable to be interrupted by war, which has never occurred, and cannot be expected, that there are strong reasons applicable to our situation and relations to other countries, which impose on us the obligation to cherish and maintain our manufacture."

On the 5th of December, 1791, Alexander Hamilton, then Secretary of the Treasury submitted to the House of Representatives, his great report

on Manufactures, a document which has probably had more influence in shaping the policy of this country on tariff legislation, than any other ever submitted to Congress. It was a most exhaustive and learned discussion of the whole question of governmental protection, and the conclusion reached was that the constitution clearly contemplated that Congress should use its power to encourage and promote diversified industries among our own people. 3 Hamilton's Works, 192.

If the limits of this paper would admit of a more extended reference to the opinions of the statesmen, who were contemporaneous with the adoption of the constitution, a unanimity of sentiment in support of the power of Congress to levy protective duties would be disclosed that would leave no room to question their interpretation of the constitution on that subject. The Federalist Nos. 10, 11, 12, 35, 41. Madison Letters to Mr. Cabell, 4 Elliot's Debates, Appendix.

Coming down to a later period, I will quote the language of Daniel Webster, a statesman, who, though opposed to the high protective policy advocated by many of his party, yet defended with all the power of his great learning and argument the constitutional right of Congress to enact such laws in that direction as in its judgment were best calculated to promote the public welfare. In his speech delivered at Albany on the 24th of August, 1844, when it is estimated fifty thousand people had assembled to hear him, the greatest constitutional lawyer this country has ever produced, spoke in the following unmistakable language: "But then comes the other power, which has been, and is now, of the utmost importance, that of *regulating commerce*. What does that import? On this part of the constitution there has sprung up in our day a great diversity of opinion. But it is certain that when the constitution had been framed, and the first Congress assembled to pass laws under it, there was no diversity of opinion upon it, no contradictory sentiments. The power of regulating commerce granted to Congress was most assuredly understood to embrace all forms of regulation belonging to those terms under other governments,—all the meaning implied in the terms, in the same language, employed in all laws and in the intercourse of modern nations. And I consider it as capable of mathematical demonstration, as any proposition in Euclid, that the power of discriminating in custom-house duties, for the protection of American labor and industry, was understood, not by some, but by all, by high and low, everywhere, as included in the regulation of trade. The term was well understood in our colonial history, and if we go back to the history of our constitution, and of the convention which adopted it, we shall find that everywhere, when masses of men were assembled, and the wants of the people were brought forth into prominence, the idea was held up, that domestic industry could not prosper, manufacturing and the mechanical arts could not advance, the conditions of the common country could not be carried up to any considerable elevation, unless there should be one govern-

ment, to lay one rate of duty throughout the union, from New Hampshire to Georgia; regard to be had, in laying this duty, to the protection of American labor and industry. I defy the man in any degree conversant with the history, in any degree acquainted with the annals of this country from 1787 to the adoption of the constitution in 1789, to say this was not a leading, I may almost say the leading motive, South as well as North, for the formation of the new government. Without that provision in the constitution, it never could have been adopted. 2 Webster's Works, 231 and 232.

But it may be said that Mr. Webster was a party leader and that the exigences of his leadership required him to defend the policy to which his party was committed. Let us turn then to the opinions of Joseph Story that great jurist, who in the seclusion of his study, undisturbed by the turmoil and clamor of partizanship, has unfolded the constitution in its minutest details, and left to his countrymen as the fruit of his labor and learning, his profound commentaries upon the great charter of their liberties. In his more prominent work on the constitution, he contents himself with presenting the arguments for and against the right of Congress to impose protective duties, leaving, as he says, the reader to draw his own conclusions from the arguments adduced. Story on the Constitution, 1077 to 1095. But in his smaller work, entitled, "A Familiar Exposition of the Constitution of the United States," published under the sanction of the Board of Education of Massachusetts as one of the series entitled "The School Library," the great jurist states his conclusions without reservation, as follows:

"The commercial system of the United States has also been employed sometimes for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes; sometimes to encourage domestic navigation, and the shipping and mercantile interest, by bounties, by discriminating duties, and by special references and privileges; and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty. In all these cases, the right and duty have been conceded to the National Government by the unequivocal voice of the people.

"It may be added, that Congress have also, from the earliest period of the government, applied the same power of regulating commerce for the purpose of encouraging and protecting domestic manufactures; and although this application of it has been recently contested, yet Congress have never abandoned the exercise of it for such a purpose. Indeed if Congress does not possess the power to encourage domestic manufactures, by regulations of commerce, it is a power, that is utterly annihilated; for it is admitted on all sides that the States do not possess it. And America would then present the singular spectacle of a nation voluntarily

depriving itself, in the exercise of its admitted rights of sovereignty, of all means of promoting some of its most vital interests."

From this review of history and authority, let us turn to a brief discussion of the question from the standpoint of reason.

The framers of the constitution were not ignorant of the history of other nations, of their laws and trade regulations, framed always with special reference to promoting their own interests as against the rest of the world. They know that the European nations were rich and powerful, having long established manufactures in all departments of human industry and that as compared with them the people of the United States were poor and ill prepared to compete upon terms of equality in any of the industries. They were not dealing with an ideal situation such as might exist if the doctrine of the golden rule governed the conduct of men and of nations. Just as in providing for the exigences of war they gave to Congress the power to declare war and to conclude peace, so in anticipation of commercial jealousies, trade rivalries and unfriendly regulations that might injuriously affect and cripple the industries of their own people, they armed the new government with the power possessed by all other nations, to lay duties upon imports and to regulate commerce, in the interest of their own people as against the world. Whether this was wise, whether it was scientific, whether it was christian, is no more involved in this argument than it would be if we were discussing the question of whether Congress has the power to declare war. It would have been as ill advised and as reckless a disregard of the first principle of national life, that of self-preservation, to have set up the new government without the power to strike a blow for commercial freedom and independence, as to have denied to it the war power.

The argument against protective duties generally assumes that they are imposed in the interest of individuals or classes. The effect of such duties may be to benefit individuals and classes but that is not their legitimate aim or purpose. The purpose of a tariff, like any other tax must be a public one and it is only upon the ground that the general welfare is involved, that the imposition of protective duties has been justified by those claiming for it a scientific basis. But it does not follow that because taxes can lawfully be laid only for a public purpose that such purpose must be revenue. Taxes are and always have been levied for many purposes of a public character in which the raising of revenue is purely incidental or entirely lost sight of. Such, for example, is the tax upon the liquor traffic in some of the states and other similar taxes imposed by virtue of the police power of the state as a matter of regulation. The tax imposed by act of Congress upon state banks being virtually prohibitory in amount, is an example of the power of taxation without reference to revenue.

In recognition of these well known facts the clause of the constitution which grants the power to lay duties on imports expressly provides that it

may be exercised to provide for the common defense and general welfare. This grant of power was broad enough in itself to justify a tariff for the promotion of domestic manufactures. No nation isolated as this was could long remain free and independent without diversified industries. It has been stated with much show of reason that the superiority of the North over the South during the war of the rebellion consisted not so much in the strength of its armies as in the fact that upon the blockading of the southern ports all avenues by which the people could supply themselves with the necessities of life, were cut off. That section of the country was almost absolutely without manufacturing industries. If trade had been the only thing necessary to national independence, then from an economic standpoint, the people of that section were right and could make more money in selecting some few industries such as were best adapted to their climate and situation and which could be produced at the least comparative cost, relying upon other countries to produce and furnish in exchange the other commodities that go to supply the varied needs of our civilized life. But so long as rival nations exist, so long as sea coast defenses bristle with cannon, so long as the skill and genius of the world's best mechanics is devoted to the invention of instruments of death and to defenses against them, so long will statesmen who are worthy of the name, devise plans for fostering all those arts and industries which are essential to the complete industrial independence of each nation from any other. A nation may be ever so strong in position, defenses or numbers, but if it be dependent upon others for food, clothing, tools or munitions of war, its position, defenses and numbers count for nothing. Freedom of commerce is one thing, but commerce must yield something to the exigencies of national life, and whenever it is seen that a nation is weak at an essential point in its industrial life because of the superior advantages of rival nations in the cheapness of raw materials, labor or capital, at that point will the true statesman begin to help his own, not for the benefit of the individuals who happen to be engaged in the industry so helped, but to strengthen a weak spot in the line of the nation's perfect independence, as he would repair a fort or build a navy. This will continue to be done

"Till the war drum throbs no longer and the battle flags are furled
In the Parliament of man, the Federation of the world."

—*Lansing, Michigan.*

I differ entirely from Senator Hill in regard to the proper method of interpreting the Constitution of the United States. It is true that it does not say in so many words "the Congress shall have power to protect American manufactures," but it does say in express terms that "the Congress shall have power to lay and collect taxes, duties, imposts and excises." This is one of the express powers of the Constitution and it is to be interpreted by the application of the rule which is applied to all the other express powers. The express power is a power to lay taxes, duties

imposts, and excises to defray the expenses of the government. The incidental power is a power to so lay them as to protect and encourage our own industries. The express power would be useless without the incidental power, for without the exercise of the latter the people of this country could not be in a condition to meet the expenses of their government.

Apparently, Senator Hill has never read the first revenue law of the United States, passed in 1789, or the debate in the first House of Representatives when it was under discussion. In that House there were ten members who had been members of the convention which framed the Constitution. Mr. Madison was the leader on the floor, and he conducted the first revenue bill through the House. Washington was President of the United States; Hamilton was Secretary of the Treasury; Jefferson was Secretary of State, and Edmund Randolph was Attorney-General. If those four men did not know for what purpose the first revenue law was enacted and why it was made a highly protective tariff, I beg to ask, who did know?

George Ticknor Curtis.

A PROTECTIVE TARIFF, UNCONSTITUTIONAL.

HON. THOMAS E. BARKWORTH.

A lawyer-like discussion of the question propounded involves a necessary sacrifice of political preconceptions difficult of attainment at any time by an active participant in politics, but especially so in the midst of a contest. An earnest effort, however, will be made to free this paper from the dogmatism of political controversy, although it is at once apparent that under the legal interpretation and construction which must determine the question lies a foundation of social and political science. Indeed, it is impossible to state the question as a strictly judicial one, for the use of the power of taxation by the agency entrusted with it precludes any judicial inquiry into ulterior motives.

Hence the inquiry resolves itself into a proposition of political science, and while we may with legal postulate and logic point the way, the statesman and not the jurist must decide the course. But the statesman will not and the politician should not lead where the jurist would not follow. Hence the importance of ascertaining with legal exactness the extent of the power granted.

It will not be questioned that even though a law be obligatory and beyond question by the courts, it may yet be unconstitutional. This always happens where by the constitution itself, or by the underlying principles governing judicial interference with legislative action, the legislature is sovereign in its power. This is the exact situation with respect to the proposition here. The question of the right to interfere by judicial process is settled against the right, but the question of legislative right under the constitution is open to discussion. *Veasie Bank v. Fenno*, 8 Wall., 533.

The constitutional right of Congress to create and maintain such a tariff has been based sometimes upon the first and sometimes upon the third of the specific grants of Section 8 of Article I of the constitution. The first grant reads as follows: "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

A question has been raised as to the proper relation of the words "to pay the debts and provide for the common defense and general welfare" to the clause. Are they phrases qualifying the power preceding, or entirely distinct grants? So positive have been the convictions of some that the latter theory was the correct one, that the punctuation has been sometimes changed so that the comma originally found after the word

excises has become a semicolon. It would seem, however, that a moment's thought would demonstrate the error in this construction. The limitations respecting the purposes to which the proceeds of the laying and collection just provided for might be applied are natural and accord well with the spirit of the preamble. The grant to Congress of any of the powers said to be contained in the disputed portion is unnatural and superfluous. How unnecessary to grant to any government the power to pay its debts, to provide for the common defense, or to promote the general welfare! But the restrictions placed upon the power of the government to extort from the people the product of their labors was an outgrowth of the advancing spirit of liberty, manifested alike in the Declaration of Independence and the warlike demands for Magna Charta. Jurists and publicists might and did discuss the righteousness of an exaction for private purposes, and there was need for certainty in the delineation of power. How necessary and proper that the government just entrusted with the unlimited power of taxation should be restricted to public purposes in its disbursements of the funds thus obtained from a free people! The general purposes of national government need no defining. Despotic, plutocratic or democratic alike assumed the functions of providing for the common defense and promoting the general welfare. The preamble had just used the same language in announcing the public needs impelling its adoption. The syntax of the clause conclusively shows the folly of an effort to dissociate the language referred to from the general power to tax, for the condition as to uniformity follows the interpolated purposes.

But assuming that the entire clause refers to the raising of revenue and that the general purposes thereof are limited, the next question propounded is, does not the "general welfare" phrase permit the use of this power for other incidental purposes, to wit, the encouragement of domestic industries? It is manifest that no precedent can aid us and that the rule of construction must be the general one applicable to every species of written grant. This involves the study of the language, the context, the surrounding circumstances and conditions, and the general object sought to be attained. First, then, as to the language. If the desired application is made by any construction of the language used, it must make the qualifying phrase refer, not to the taxes, duties, imposts and excises themselves, but to the method by which they are levied, a very unnatural interpretation. I contend that it is the duties, imposts and excises when laid and collected which shall be used to provide for the general welfare, and not that the process of laying and collecting may thus provide. No one would think of claiming that the legislation itself could pay the public debts or provide for the common defense. These provisions are clearly applicable to the proceeds of the scheme. The entire grant is evidently one of the power of taxation for limited purposes.

Taxation is thus defined by Judge Cooley: "It is the making of rules and regulations under which the revenues for all the needs of government"

are to be apportioned among the people and collected from them," (Cooley on Taxation, p. 32), and this definition accords with the decision of every American court having occasion to define the term. Add to this the specific exactions permitted and the limitations upon the disbursement of the fund, and we have the complete grant. It seems clear that this clause does not extend, but restricts the power as above laid down.

"The power to tax is the power to destroy" says Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheat., 316, 431. And this destruction resulting from the needs of government may be constitutional and morally justifiable, but let the purpose be to destroy, where no imminent need dictates the fiat of law to that end, and the constitutional power has been exceeded. By a parity of reasoning the purpose being the raising of revenue the injury thereby done to any person or industry as an incident to a tariff on importation would be no just cause for complaint, while any lessening of individual privileges by the machinery of taxation based, not upon the financial needs of government, but upon a desire to foster and encourage a particular industry would be indefensible.

It is manifest from the context that specific powers were not intended to be left to inference, even in the very direction in which it is claimed this power may be extended, for Section 8 provides, after granting power to regulate commerce, a specific power to establish uniform rule of naturalization, to establish post offices and post roads, while the power to raise and support armies and to provide and maintain a navy does not appear to have been sufficient authority in the hands of the framers of the constitution to make rules for the government and regulation of these forces, for specific authority is granted to Congress for this purpose, indicating clearly that it was intended to avoid any conflict between powers granted to Congress and those granted to other departments of government, or reserved to the states or people respectively. Congress is granted the power to promote the progress of science and useful arts, but in a specific manner by securing for a limited time to authors and inventors the exclusive right to their respective writings or discoveries. In a document thus guarding the effect of its grants we would scarcely expect to find such powers buried within the general language of a clause which Mr. Justice Miller in his Lectures on the United States Constitution, at page 446, sums up as "a grant to raise money by taxation for the support of the government."

I might refer to similar language of our own Judge Cooley, but it is so familiar as not to need reference. The history of our country preceding the adoption of the constitution, including the struggles for freedom and the cause which led up thereto, shows conclusively that amongst the foremost of the abuses which impelled their action was the imposition of taxes without the consent of those taxed. Yet, if we are to accept the theory of the protectionists, this important power of taxation would be practically without limit in the hands of the general government. This would be, it seems to me, inconsistent with the express purpose of the

preamble, "to secure the blessings of liberty to ourselves and our posterity."

Apparently a more serious question is involved in the assertion of power under the clause granting to congress the right to regulate commerce with foreign nations. The philosophical inquiry suggests itself. Does the power to regulate commerce permit the government (unless a public exigency demands it) to prohibit in whole or in part commerce with foreign nations? This is not answered by reference to precedent, for no one will claim that the government of a monarchy, either absolute or limited, affords in this particular an example which a republic should emulate. There is manifestly a radical limitation upon the powers of governmental agencies arising from the new relations incident to popular sovereignty. One of the enumerated causes of complaint in the Declaration of Independence was "cutting of our trade with all parts of the world." It seems scarcely probable that the exercise of power which such a carefully worded and important document designates as "injury and usurpation" should be almost immediately entrusted to a new agency over which the states had no control.

Commerce has been judicially defined as "intercourse and traffic between people." *Gibbons v. Ogden*, 9 Wheat., 189. Therefore, the right to regulate commerce under this definition would necessarily give a field for the restriction, and in extreme emergencies, even an embargo of traffic with any or all countries. But this power must be exercised under those settled limitations upon the authority of governing bodies springing from the organic structure of society, and the recognized rights incident to citizenship. As is well said in *Loan Association v. Topeka*, 20 Wall., 655. "There are limitations of the powers of government which arise out of the essential nature of all free governments, implied reservations of individual rights without which the social compact could not exist and which are respected by all governments entitled to the same. Among these is the limitation of the right of taxation that it can only be used in and of a public object, an object which is within the purpose for which governments are established."

The question then becomes one not of a proper field for legislative enactment but of restrictions within the field.

Every civilized government had previous to this time regulated commerce, not always by proper laws or in recognition of the citizen's right. But that the tariff in its results had been looked upon as an incident to the power of taxation rather than to any regulation of intercourse between people seems to be universally the opinion of students of political science. Later, when under the free government of the new republic the exercise of this power for the purpose of preventing the injurious result of foreign competition upon our manufactures was seen to be incompatible with the limitations upon this power, in the constitution itself, resort seems to have been had by Henry Clay and his followers to the convenient power which

was accompanied by no such limitation. Accustomed as were the early jurists to the binding force of precedents resting upon different social relations, it is not surprising that Judge Story should accord some force to the constantly recurring exercise of such power in monarchical governments; nor that Daniel Webster should have been himself somewhat shaken with respect to the constitutional power of the government to thus restrict the traffic between countries under the power to regulate commerce. But recurring again to the language of the court in *Loan Association v. Topeka*, before quoted, the common sense of the people of this country and the trend of its judicial decisions will be found to be in accord with the limitations of the right of taxation to "an object which is within the purpose for which governments are established."

Can it be said that governments are created for the purpose of fostering and supporting industries? Granting that the needs of the government, in view of war or other interruptions of commerce, might be at sometime a sufficient warrant for the imposition of taxes upon the people for the purpose of their establishment, (a purpose, even thus stated, of very doubtful authority in a republic) still the present position of the industries of this country precludes the pertinency of this line of inquiry. The American policy of protection, so called, proceeds upon another theory, and it is this practical continuance of the fostering care of legislation as a permanent factor in our industrial progress which is alone worthy of discussion at this time. What public purpose is claimed to be conserved? Certainly not the one incident to the regulation of commerce, for regulation is not prohibition. This has been frequently decided by numerous courts; directly by our own court. *In re Hauck*, 70 Mich., 396. The regulation of commerce presumes the rightfulness of commerce as an individual privilege. Such restrictions as the government has a right to place upon it, aside from questions solely pertaining to transportation, must spring from one of three moving causes: (1) the incidental restriction incident to the levying of a tax upon an imported article or person; (2) such necessary inspection as the public protection demands for its security against the introduction of persons or things in themselves undesirable; (3) the prohibition of the importation of persons or articles inimical to the interests of the people. If the principles previously referred to are correct, the first of these causes would be limited to a tariff in which the primary and only direct purpose should be the raising of revenue for the needs of the government, and would naturally be applied to those articles which with the least burden upon the people and the most equality in apportionment would raise most conveniently the required income. In this proposition, which I believe to be correct, there is no room even for the incidental protection, so much talked about, as a motive for discrimination. The second clause above noted, it will be conceded, furnishes no proper field for protective legislation. The third ground of governmental interference with commerce does not proceed upon the idea of benefit to

the people derived from some institution made possible by the exclusion of the obnoxious article, but to the danger arising from the introduction of the article itself. It is apparent that none of these propositions furnishes a basis for the imposition of a protective tariff. The argument in its favor, when analyzed, rests upon positive and direct rather than incidental power. It assumes an implied grant of power to use the machinery of taxation, not for the purpose of obtaining revenue, but to enable manufactures to exist, which without legislative aid would not be self-sustaining. Equality of opportunity is no answer to the manifest injustice of this proposition. The power which necessarily accompanies it is such as is inconsistent with the very basis of our system of government, which differs from the monarchical countries of Europe in according, in theory at least, "equal rights to all and special privileges to none." Whatever temptation, arising from exigencies unforeseen by the founders of the constitution, may induce an extension, by construction, of powers granted to Congress, no such complete disregard of the essence of popular freedom could with reason be claimed as within the intention of an instrument designed to be the consummation of a dearly bought freedom. Any law, whether using the power of taxation or a direct bounty as a means of accomplishing its purpose, which should truthfully declare such purpose to be what the object of protection really is, the building up and sustaining, by enforced exaction from the whole people of special lines of industry, would under authority of *Loan Association v. Topeka* and a hundred other decisions of various courts be unconstitutional and void. Cooley's Constitutional Law, page 58.

Railroads are public highways and as such the building and equipping thereof may be with some reason directly connected with the public interest. Because of this fact many courts have sustained laws imposing taxes for their building. But the doctrine of these cases is successfully refuted in the instructive case of the *People v. Salem*, 20 Mich., 452, and the opinions of Judges Cooley, Campbell, and Christaincy in that case so clearly exhibit the fallacy of the logic of the protectionists, even to the moderate extent to which it is sought to be applied in that case, that it would appear that nothing need be, or perhaps could be, added to their argument. But the connection between the public interest and the establishment of a quasi-public institution like a railroad is so much closer and more direct than that of the alleged incidental benefit derived by the public from the existence of manufactures as to deprive the logic of Judge Graves in his dissenting opinion in that case of any application to the theory. It is conceded that so far as the purposes of this article are concerned the question of economic result of the policy would not be material, so far as the same did not affect the rights guaranteed by the constitution to individual citizens.

But apart from the serious problem of the aggregate gain or loss, the impossibility of preventing the unequal distribution of burdens and benefits would seem to render the plan inconsistent with our civilization. In

monarchical Europe when monopolies were farmed out to individuals for the enriching of the monarch's treasury, the result of the scheme as affecting citizens would receive but little attention. Hence the law's maxims and the decisions of the court partook in a measure of this indifference. But modern jurists of the republic keeping pace with public sentiment are ever broadening the foundation upon which rest individual rather than collective rights. The requirement that courts and legislatures alike shall justify, as a public necessity, every demand made upon the citizen will, I think be conceded to be in full accord with political science as developing under democratic influences.

Lawson, Michigan.

ATTACHMENT BEFORE DEBT IS DUE.

PHINEAS PIERCE, *et al.* v. PETER JOHNSON & Co., *et al.*

Michigan Supreme Court, Oct. 4, 1892.

1. An affidavit stating, "That recently and upon October 27, 1890, two certain chattel mortgages were executed and filed covering the property of Peter Johnson and Sarah J. Healy, copartners; that the assignee of the mortgages has taken possession of the property therein described, and is now selling the same at retail and at a rapid rate; that there has been placed on file in the office of the recorder of the City of Ironwood, a bill of sale from Peter Johnson upon all his tangible personal property, and that the firm of Peter Johnson & Co. is wholly insolvent," does not state sufficient reasons for the immediate issuance of a writ of attachment, before the debt is due, under 3 How. Stat., §8016 *a*.

2. The giving of a bond by the party from whose possession the property was taken by the sheriff, and who was a stranger to the suit, does not affect the rights of defendants in any manner, nor operate as a waiver of his right to move to quash.

Error to Gogebic. Facts stated in opinion.

Hammond & Kissane, for appellants; *M. M. Riley*, for plaintiffs.

GRANT, J.—This suit was commenced by attachment under Act No. 149 of the Public Acts of 1889. This act authorizes the commencement of suit by attachment before the debt is due. The act requires the affidavit to "show reasons for the immediate issuance of the writ to the satisfaction of the circuit judge." The affidavit was made by the attorney for the plaintiffs, and the only facts stated therein tending to show an exigency for the issuance of the writ are as follows: "That recently and upon October 27, 1890, two certain chattel mortgages were executed and filed covering the property of Peter Johnson and Sarah J. Healy, copartners; that the assignee of the mortgages has taken possession of the property therein described, and is now selling the same at retail, and at a rapid rate; that there has been placed on file in the office of the recorder of the City of Ironwood, a bill of sale from Peter Johnson upon all his tangible personal property, and that the firm of Peter Johnson & Co. is wholly insolvent." All other allegations in the affidavit are upon information and belief.

The property seized was in the possession of a third party, who obtained a release of the property from the attachment, by giving a bond conditioned for the payment of any judgment that might be recovered against the defendants Johnson and Healy. Neither of the defendants was a party to the bond. The defendant Healy appeared specially, and entered a motion to quash the affidavit and writ for the reason, among other things, that the affidavit made no case to justify the issuance of the writ. This motion was overruled by the court. The defendants took no further steps, and judgment was entered against them upon default. Defendants bring error.

It is not claimed that the chattel mortgages and bill of sale were not given to secure *bona fide* debts. The record does not contain either the mortgages or bill of sale. In the absence of any statement of the provisions of the mortgages it must be presumed that the mortgages took possession and were proceeding to sell in accordance with their terms. The

law authorizes the debtor to give either or both to secure his creditors. The fact that the mortgagees took possession within a few days after the execution of the mortgages is not, of itself, a badge of fraud. Diligent and honest creditors may take this course to secure their debts. When the facts alleged in the affidavit are consistent with an honest purpose on the part of creditors to secure their just claims, no case is made to authorize the seizure of a debtor's property by attachment. The motion to quash should have been granted.

The bond given by the party from whose possession the property was taken by the sheriff, and who was a stranger to the suit, in no manner affected the rights of the defendants, and did not operate as a waiver of their right to move to quash.

After judgment the writ of error was the proper remedy for a review of the proceedings in this court. *Jewell v. Lamoreaux*, 30 Mich. 155; *Stall v. Diamond*, 37 Mich. 429; *Emerson v. McCormick Harvesting Mach. Co.*, 51 Mich. 5; *Warren v. Crane*, 50 Mich., 300.

The defendants had done nothing to waive the defect in the affidavit or to confer jurisdiction on the court. Judgment must be reversed and judgment entered in this court quashing the proceedings.

The other justices concurred.

NOTE.—Three other cases all against the same defendants as in the cases above, one brought by the Ripon Knitting Works, another by Herman S. Mack, and the other by H. J. Leonard, *et. al.*, were decided at the same time and a similar decision rendered in each, the facts being the same in each case. The act under which the attachment proceedings were begun, was approved June 17, 1889. It provided that proceedings in attachment might be begun before debt became due, and that the affidavit, upon which the writ was to issue, might, instead of stating that the indebtedness was then due, state when the same should become due, and show reasons for the immediate issuance of the writ to the satisfaction of a circuit judge, and obtain his order endorsed thereon that the writ might issue and be proceeded with. This was an unusual proceeding and quite an innovation upon the existing laws and the general theory as to the time and manner of beginning suits in attachment. The validity of the law has been doubted, and it is very apparent that the Supreme Court look upon it with disfavor. Several suits have already been begun under it, and in nearly every case the judges of the lower courts have granted the issuing of the writ upon the showing made in the affidavit. In all cases where the writ has been granted, and the case brought before the Supreme Court, that tribunal has reversed the decision of the court below and ordered the writ quashed.

It would seem that the facts stated in the affidavit in the case above constituted about as strong reasons for the issuance of the writ, before the debt was due, as could well be given, if any reasons or grounds there are for such an unusual proceeding. But a stronger case than this even, and a more striking example of the Court's unwillingness to grant the writ under such circumstances, may be found in *Howell v. Circuit Judge*, 88 Mich., 361. In that case Judge Dickerman, of Muskegon County, granted the writ, being satisfied with the "reasons for the immediate issuance of the writ" which were set up in the affidavit. After properly setting forth the time the different amounts would become due the affidavit set up the reasons upon which the creditor based his claim for the writ, which were, substantially, that the debtors had assigned, disposed of, and concealed

his property with intent to defraud his creditors; that he was not a resident of the state and had not resided therein for three months immediately preceding the time the affidavit was made; that he had assigned large portions of his property; that he was in failing circumstances, and that the just debts owing by him would far exceed in amount the property he owned; that attachments aggregating many thousands of dollars had been issued out of that court and levied upon the property of the debtor in that county, and that the creditor would lose the entire amount of his debt or claim unless the writ of attachment was issued. The circuit judge held that these were sufficient reasons upon which to grant the writ. The Supreme Court held otherwise: "The affidavit would have been sufficient," they said, "to obtain a writ of attachment if the debt had been due; but, in order to avail himself of the most extraordinary remedy given by this statute, the reason for its issue must be shown by facts and circumstances so given in detail that the circuit judge can satisfy himself from such facts and circumstances that the writ ought to issue. It will not do for the affidavit simply to swear that he knows that the defendant in the suit has assigned, disposed of, or concealed his property with intent to defraud his creditors. The facts attending such disposition or concealment of the property must be set forth, and its relation as to value to the remainder of the property owned by the debtor, so that the court may know something about it as well as the affiant." Considering the affidavits in these cases it may seem a little difficult to understand just what would be considered "~~facts~~" sufficient to warrant the issuing of the writ.

The Act of 1889 does not change the wording or meaning of the old law so far as it goes, but simply adds another section to it. It plainly appears that the object of the statute is to give the right to a writ of attachment before the debt is due only in those cases where the plaintiff was entitled to it after it was due, according to the existing law. It provides that an affidavit shall be made in compliance with the provisions of the old law, the only difference being that the affidavit shall state when the debt will become due, instead of stating that such indebtedness is due, and further it must "show reasons for the immediate issuance of said writ to the satisfaction of a circuit judge." It is the evident intention of the statute to require the same statements in the affidavit as to fraudulent acts of the debtor as the older statute. Under the special provisions that the affidavit shall "show reasons" etc., it is the exigency, the reasons for the *immediate* issuances of the writ, which must be shown. The question then arises, what reasons must be shown? That is the point upon which all the difficulty in construing the statute centers. In this respect the statute seems to be fatal by defective. It simply states that the affidavit shall "show reasons . . . to the satisfaction of a circuit judge." Not the slightest criterion is given by which either court or suitor is to determine. Is it to rest entirely with the circuit judge, as a matter of personal opinion, the soundness of which is to be questioned or denied by the Supreme Court at will, with no possible means by which counsel may presage what that opinion will be? This act says absolutely nothing as to the nature or extent of the facts, which must be stated, nor the degree of particularity with which they must be set forth. In the face of the decisions above referred to, lawyers will be loath to attempt to secure a writ before the debt is due, when they have no more definite means of determining the sufficiency of the affidavit upon which their writ is to issue. Doubtless many instances have already arisen where the exigency of the case merited

the immediate issuance of the writ, but which counsel have not dared to obtain from the lower court, fearing the ultimate holding of the court above. As matters now stand the law is practically anullity, and the sooner it is so determined the better it will suit a majority of the profession.

The constitutionality of the statute has been questioned, the first time in *Newman v. Kent Circuit Judge*, decided January 28, 1890, in which no written opinion was filed, and again in *Spooner v. Howell, supra*. In neither case have the court ruled directly upon this point, dismissing the writ, instead, for want of a proper affidavit. The constitutionality of a statute providing for a writ of attachment for a debt not due would probably not be questioned providing it was properly and consistently drawn. More than half of the States already have such statutes, and in a majority of those the writ issues as a matter of course in the same manner as a writ for a debt due. Although the remedy may be an extraordinary one, yet it is a just one if surrounded with proper safeguards. The statute giving the remedy should be so construed as to make it available. Courts and law-makers, in their sympathy for the unfortunate but dishonest debtor, should provide some means to prevent him from obtaining an undue advantage over the more unfortunate creditor.

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE,
ELI R. SUTTON,

H. D. JEWELL,
U. F. BICKLEY.

OFFICIAL PUBLICATION MICHIGAN STATE BAR ASSOCIATION.

Published monthly, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.

Address all correspondence to MICHIGAN LAW JOURNAL, Grand Rapids, Mich.

THE *Chicago Legal News* says: "A learned Professor asks, can there be a university, in the true sense of that word, without a law department?" If our humble opinion is desired we should emphatically answer, "No," and we do not think it necessary to enlarge upon our reasons for our opinion.

THE leading article in this number by Prof. J. C. Knowlton upon "The American Mutuum," is one of peculiar interest. It has for some time been the claim of modern text writers upon the subject of bailments that the species of bailments formerly termed the Roman Mutuum did not longer exist; but that such transactions constituted a sale. From this generally accepted theory Prof. Knowlton differs and states some very cogent reasons for his theory.

THE Board of Regents of the University at their October meeting failed to act upon the plan to establish a practice court in the law school. The matter will probably be considered at the November meeting of the board. There does not seem to be any reason to urge against the plan except that of an increase of expense, but when it is considered that the law department is the only self-supporting department of the University, and turns in every year a considerable amount over and above expenses, to assist in paying the running expenses of the other departments, it would seem that an increase of less than \$1,000 is not extravagant, especially in view of the benefits to the students of more practical work.

UP IN Manitoba, Canada, we have the rather peculiar spectacle presented of a legal journal, at the request of many members of the bar, objecting to the scarcity of reports issued. According to the *Western Law Times*, there have been only two volumes of law reports issued by the reporter since August, 1891, and the reporter has been paid \$1,300 for

preparing these two. In this country, in the majority of states, we find rather the contrary state of affairs. The multiplicity of reports is actually becoming embarrassing to the practitioner, and instead of complaining about the scarcity, the bar is endeavoring to conceive of some plan to relieve lawyers from the increasing volume of state reports.

CAN a deaf man act as a juror? An English judge holds that he cannot. The *Law Journal* (London), tells of a case at Old Bailey where a jury returned a verdict of guilty of murder against a prisoner. In rendering the verdict the foreman stated that two of the members of the jury were stone-deaf and had not heard the evidence, but that it had been explained to them by the others. The judge discharged the jury and ordered the case to be tried again.

THE numerous patent medicine dealers who offer large rewards for cases which their preparations do not cure, etc., should beware how they hold out these inducements unless they intend to make good their offer. They should take warning from the case of *Carlill v. Carbolic Smoke Ball Co.*, Queen's Bench Division (July 4), a report of which is given in full in one of the last numbers of the *Albany Law Journal*. The proprietors of a certain preparation known as "The Carbolic Smoke Ball" advertised to pay £100 to anyone who contracted influenza after using one of their smoke balls according to directions. The plaintiff purchased one upon the faith of the advertisement, but it failed to ward off the influenza. Action was thereupon brought to recover the £100 promised in the advertisement. The court decided for the plaintiff, holding that the offer as proposed in the advertisement, coupled with the performance by the plaintiff of the condition, created a contract on the part of the defendants to pay the £100 upon the happening of the event mentioned in the proposal.

AN EXAMPLE of the ingenious arguments sometimes made by violators of a law in their attempts to justify an evasion of it may be found in *Inter-State Commerce Commission v. Texas Pacific R. R. Co.*, U. S. Circuit Court, S. D., New York. The defendant had been violating an order of the commission, but sought to defend on the ground that the proceedings were defective because a certain connecting carrier, participating with defendant in the carriage between certain points, was not made a party defendant. It seems very clear that the court did right in refusing to entertain this theory and holding that if the defendant is violating a proper order of the commission it cannot defend upon the ground that another wrong-doer is also violating it; neither can it set up, in excuse of its violation of the order, that unless it was given the traffic obtained by the violation, the traffic would go to a competing carrier. If such a defense were allowed, in the language of the court, "the inter-state commerce act would be emasculated in its remedial efficacy, if not practically nullified."

In justice to the Honorable Edward Cahill and the Honorable Thomas E. Barkworth, who have contributed discussions upon the constitutionality of a protective tariff in this number, it should be stated that their articles were prepared upon very short notice, and possibly are not as comprehensive or thorough as they undoubtedly would have been if

they had received ample notice. However, both of these gentlemen are lawyers ranking high at the bar of the state, and they have undoubtedly given the question some thought since the national democrat convention made it such a prominent issue in this campaign. The question as submitted to them is as follows: "Has the Federal government the constitutional power to impose and collect tariff duties except for the purpose of revenue only?" Mr. Cahill, well-known as an ex-justice of the Supreme Court of Michigan and president of the Michigan State Bar Association, maintains that the Federal government has such power, and Mr. Barkworth, one of Jackson's ablest lawyers and a candidate for the legislature from that county, asserts that it has not such power. It can be said of both contributions that they are so written as to be interesting reading to the layman as well as to the lawyer.

JUST as we are going to press, the mail brings us the September—October number of the *American Law Review*. In it we find a communication to the editors from a Texas lawyer who takes empathic exception to the statements made by the editors in the July—August number that the tariff utterance of the Democratic platform is "nakedly silly," and that the opinions of lawyers who would uphold it are "not worth a pinch of snuff." In view of the discussion of the same question in this journal by Messrs. Cahill and Barkworth, some interest will be attached to the controversy in the *American Law Review*. The Texas lawyer builds up an argument upon an interpretation of the language of Section 8, Article I, of the Constitution which would make the section read, "Congress has no power to lay and collect taxes, duties, imposts and excises for any purpose than to pay the debts and to provide for the common defense and general welfare of the United States." He says that under such a construction "Congress has no power to lay duties on imports to protect domestic industries." He relies upon *Loan Association v. Topeka*, 20 Wall., 655; the case which Mr. Barkworth quotes with approval. The attitude of Judge Thompson, editor of the *American Law Review*, as reflected in his comments upon the communication of the Texas lawyer, is significant. He acknowledges that perhaps the language used by him "was a little too strong," and he modifies it by saying, "the plank in question is an exceedingly unfortunate one, involving as it does a mal-interpretation of the Constitution and an attempt to limit the powers of the general government in a manner which is contrary at once to sound policy and to common sense." What Judge Thompson says comes with increased force because of the fact that he is a democrat, and might naturally be expected to support the democratic platform. But like the eminent New York constitutional lawyer, George Ticknor Curtis, a democrat, he is outspoken in his belief that the democrats blundered when they declared a protective tariff unconstitutional. Judge Thompson says, "We utterly disclaim any purpose of introducing politics into this publication; and if it is at all to the purpose, we will add that the writer of this note sympathizes with the democratic rather than with the republican tendencies on the tariff question." The *American Law Review* is undoubtedly the leading law journal of the country, and Judge Thompson, as its editor, has a national reputation. He is one of the most distinguished of the lawyers and jurists of the West, and is principally known for the number and excellence of the legal text-books of which he is the author. His emphatic disapproval of the tariff plank of the democratic platform is, therefore, not likely to be

relished by his party, particularly in St. Louis and Missouri where his opinion commands great respect.

While the editors of this journal entertain views identical with those held by Judge Thompson upon this constitutional question, we wish to state emphatically that we have opened our columns to the discussion of this question without the least regard to political considerations. We have not attempted to make a party question out of it, but we expressly requested our contributors to treat it "from a strictly legal standpoint," and they have done so.

It is certainly to be regretted that the decision of the New York Court of Appeals, upon the apportionment law of 1892, was such as to give the projectors of the "gerrymander" any cause for encouragement. The law is declared valid, the objection that the districts were unevenly divided so that the representation was unequal being determined insufficient to render the law void. The court, unfortunately, divided upon political lines, five of one party, approving, and two of the other party, dissenting. The sustaining opinion is to the effect that the districting lay in the discretion of the legislature and that their work could not be reviewed in the courts, if they did not apportion according to strict mathematical rules, but that the act might be declared unconstitutional if it showed a gross abuse of legislative discretion. This doctrine was expressly repudiated in Wisconsin, Michigan, and in the lower courts of New York, whose judges had the admirable courage to take a bold stand against the reigning political iniquity, the "gerrymander." The judges of the New York Court of Appeals would probably command more respect if they had shown some of the fearlessness and intrepidity displayed by the Chief Justice of the Supreme Court of Michigan who said, "The time has arrived for plain speaking in relation to the outrageous practice of 'gerrymandering,' which has become so common and has been so long indulged in without rebuke that it threatens not only the peace of the people but the permanency of our free institutions. . . . There is not an intelligent school boy who does not know what is the motive of these legislative apportionments, and it is idle for the courts to excuse the action on other grounds, or to keep silent as to the real reason, which is nothing more nor less than partisan advantage taken in defiance of the constitution and in utter disregard of the rights of the citizen." If this had not been written before the decision in the New York case was rendered, the clause, "it is idle for the courts to excuse the action on other grounds," would have been regarded as a direct reference to and condemnation of the timidity of the judges of the New York Court of Appeals. It is a matter of sincere regret upon the part of all true citizens of whatever party, who are interested more in the permanent maintenance of a pure government than in the temporary advantage of a political party, that the effect of the unbroken line of judicial decisions condemning the "gerrymander," should be weakened by the judgment of the court of last resort in the "Empire State."

A BRIEF editorial paragraph in the *American Law Review* for July-August, upon the subject of reparation for judicial errors, was referred to in the September number of this journal, and we notice that it was also commented upon in the issue of September 21 of the *New York Law Journal*. The editor of the latter publication does not agree with the *American Law Review*, judging the project to be of doubtful constitution-

ality and not of appreciable practical necessity. In some of the nations of continental Europe a system of reparation for judicial errors exists, and the inquiry is, why not establish such a system in this country? By the phrase "judicial errors" is meant, as we understand it, not the mistakes of law on the part of the judge entirely, which, by the way, in criminal cases are of rare occurrence, but more particularly the blunders of juries. Justice is more liable to miscarry by reason of circumstantial evidence and the skill of the advocate who has the faculty of handling juries with cleverness and dexterity, than it is because of an error of the judge. After all, the instances are very rare in which the innocent suffer. It is a matter of common knowledge that the pardoning power is shamefully abused at times, and it is highly probable that there are more criminals escape punishment through pardon than there are persons sentenced for crimes of which they are innocent. It seems to us far wiser to direct our energies and faculties towards methods and plans for the improvement of our jury system so that judicial errors may become of more rare occurrence, rather than to the devising of schemes to relieve and recompense those who have suffered because of these errors. In short, remove the causes of these mistakes so that there will be necessity for "a system of reparation for judicial errors," instead of permitting the blunders and errors to multiply. In his article upon "Reform of Michigan Circuit Courts," in the October number of this journal, Mr. Robert E. Bunker testifies that the better class of business men escape jury duty entirely, an observation which he has not been alone in making. It is a well-known fact that juries are too often made up of men who are made of material easily moulded by the skillful lawyer and hence it is that "judicial errors" are made more possible. Mr. Bunker truly says, "No citizen of the community is too good to serve his time in doing jury duty. . . . Good judges help greatly to make good jurors. Good judges will have good jurors. The judgments of courts under such circumstances which shall not do full justice to litigants will be indeed exceptional." We are inclined to agree with our New York, rather than with our St. Louis contemporary, that a system of reparation for judicial errors is not of "appreciable practical necessity."

REQUIREMENTS FOR ADMISSION TO THE BAR.—If there is any portion of the machinery of our state government which needs a thorough and complete revision it is the requirements for admission to the bar. The present statutes upon the subject are meager indeed. Sec. 7174, H. S., provides that, "The Supreme Court may grant to any citizen of this state of good moral character, and of the age of twenty-one years, a license to practice as an attorney and counsellor at law, upon an examination at a stated term of such court, in the presence of the justices thereof, when satisfied that the applicant possesses sufficient legal learning and ability to discharge the duties of such office." Sec. 7177, says: "The Supreme Court and the several Circuit Courts, may license any attorney and counsellor at law of this state, to practice as a solicitor and counsellor in chancery, under such rules and regulations as they shall prescribe."

It has come to be a notorious fact that these "rules and regulations," which the courts are given authority to prescribe, are far from being as adequate or as strict as the good reputation of our great State and its Bar demands. Fortunate we are that no dire consequences have as yet resulted from the loose system, and our Bar is a strong one, and one of which the people of Michigan may be justly proud, but the evil results that may fol-

low the continuance of the present informal system are obvious. The question has already attracted the attention of the best lawyers. At the last two annual meetings of the Michigan State Bar Association some attention was paid to it but no decided action taken. Some very pointed remarks were made by the Hon. T. J. O'Brien, the retiring president of that organization, in his address delivered at the last annual meeting. "The method of admitting to the Bar," he says, "heretofore has been so simple and informal as to amount to a little more than a farce. The greater number are admitted through the Circuit Courts, where, upon application being made, two or three busy lawyers are called in to question the applicant and pass upon his fitness. However, able or successful the members of such a committee may be, they are not suitably prepared to conduct such an examination. . . . The loose manner in which students, so-called, are permitted to come to the Bar, results in loose notions as to the duty of the members of the Bar when they are admitted. The tone of the profession is thus lowered, and not only are incompetent persons permitted to do much mischief, but dishonest ones are also free to prey upon an unsuspecting clientage."

The subject has been brought before different bar associations at various times. Considerable attention was given to it by the American Bar Association at each of its last two or three annual meetings. Upon one of these occasions the following resolutions were adopted:

"Resolved, That the American Bar Association strongly recommend that the power of admitting members to the Bar, and the supervision of their professional conduct, be in each State lodged in the highest courts of the State; and that the examination of candidates be referred to a permanent commission appointed by the court, in order that a full and systematic knowledge of elementary law may always be exacted as a condition of admittance:

"Resolved, That at least two years of study should be required of every student before he presents himself for examination; and that in the older States, having a more settled and comprehensive jurisprudence of their own, this limit should be extended to three years."

It seems to us that a reform along this line should be made. It is certainly imperative that some steps be taken at once if the State of Michigan wishes to keep abreast of her sister States, who are making rapid advancement in this particular. In Ohio the old system of county examinations by local committees has been abandoned, and a system of uniform examination under the supervision of the Supreme Court has been provided for by statute. The examinations are conducted in writing, under thorough and rigid rules, which prescribe the subjects upon which examination shall be made, and the standard which must be attained by the applicant. The period of study required is two years. In New York three years of legal study are required, except in case of college or university graduates, who are admitted after two years study. One year of such legal study must have been spent as a clerk in a lawyer's office. If the applicant is not a college graduate he must present a certificate of a Regent that he has attained a certain standard of proficiency in general English studies. In Pennsylvania the applicant must have pursued two full years of legal study before he will be admitted to examination. If he begins the study before he is twenty-one years of age three years are required. He must also pass a satisfactory examination in Latin and general English studies. In Massachusetts three full years of study are required, either in a law office or in a law school. Minnesota has recently

enacted some very strict regulations for admission to the Bar in that State. Their laws in that respect have been quite severely criticised, however, because great partiality is shown graduates of the law department of their State University.

Other states have within the last two or three years passed laws of a character similar to those in the states mentioned above. The standard of the Bar in those states has been preceptibly raised thereby. It remains for Michigan to follow their example, and to take its stand, as it always has done, with the leaders in the securing of that which will best promote the interests of a commonwealth and elevate its people. The Bar has been often said to be one of the great conservative forces of society. As such it should be intellectual, honest, thorough and competent; and every member should see to it that proper laws are enacted keeping it in that condition. About one year ago a bill was prepared by the committee on legal education and admission to the Bar of the Michigan State Bar Association, of which Levi T. Griffin, Esq., of Detroit, was then chairman. The bill provided for a committee of nine or more, to be appointed by the Chief Justice of the Supreme Court, with the concurrence of the Associate Justices, who should hold office for two years. The branches of law upon which the student should be examined, the petition to be filed, and the course to be taken generally to secure admission were all defined in the bill. We do not know of any definite action ever having been taken by the legislature upon the bill. From our understanding of the bill we believe it sufficient to remedy the existing evil. If not, it should be so changed as to do so, and that at the very first opportunity. A proper bill should be presented at the very beginning of the next session of the legislature. Let every honest lawyer do his part to secure its passage.

FLOYD R. MECHEM.

The University of Michigan is to be congratulated upon the appointment of Mr. Floyd R. Mechem to the Tappan Professorship of Law. Mr. Mechem leaves a choice clientage composed of some of the most prominent business men in Detroit, to devote his talents and energies exclusively to legal instruction. The profession will lose one of its most accomplished and respected members from active practice. There are few attorneys that excel both as court lawyers and also as legal writers. Mr. Mechem combines the versatile acquirements that have already made him eminent in both the theory and the practice of the law. His published works have been accepted as standards of authority.

In temperament, in methodical industry and in facility of analysis he resembles Judge Cooley. Students will find him a man of quick and broad sympathies, anxious to make his work productive of permanent advantage to them.

Mr. Mechem is a native of the State of New York. Since 1866 his home has been in Michigan. He was a pupil at the Ann Arbor High School and subsequently taught school at Whitmore Lake for two years, thus carrying his commissary department along, studying law evenings and vacations.

He was admitted to the Bar in 1879 and practiced at Battle Creek until 1887. During the five years that he has been in Detroit he has rapidly advanced to the front rank of the Wayne County Bar.

Edw'd W. Pendleton.

Detroit.

NOTES OF RECENT MICHIGAN DECISIONS.

LANGUAGE LIBELLOUS *Per Se*.—In *Sanford v. Rowley* (Oct. 4, Grant, J.) defendant had published the following of plaintiff: "We know, of course, that Sanford would not hesitate to lie in court or anywhere else, in order to defend himself against the truthful charges of treachery which the *Journal* preferred against him. In bold, willful, skillful and systematic prevarication he has probably never had an equal in the State of Michigan." This was held to be clearly libellous *per se*, and no innuendos necessary.

TRANSFER OF OWNERSHIP OF PROMISSORY NOTE FOR PURPOSES OF SUIT.—In the case of *Watkins v. Plummer* (October 4, Montgomery, J.) the endorsee upon a negotiable promissory note is sued in Jackson county, where he has business interests although his residence is in Saginaw county, by the plaintiff, to whom the bank in Washtenaw county, where the note was discounted, had transferred the note for collection. The defendant claimed that the note was owned by the bank and that it was transferred for the purpose of suing him away from home, thus being a fraud upon his rights. It appeared, however, that the defendant was aware of the real ownership of the note and that the plaintiff was merely an agent for collection, and therefore the defendant was not misled into pleading the general issue, nor was there any fraud in obtaining jurisdiction of the person, either upon the court or upon the defendant. A plea to the merits waives any irregularity in obtaining jurisdiction of the person. *Grand Rapids, etc., R. R. Co. v. Gray*, 38 Mich., 461; *Gott v. Brigham*, 41 Mich., 227; *Thompson v. Michigan, etc., Ass'n*, 52 Mich., 522. An agent for collection, if authorized, can sue in his own name. *Brigham v. Gurney*, 1 Mich., 351; *Loddell v. Bank*, 33 Mich., 409; *Boyd v. Corbitt*, 37 Mich., 52.

CAN TROVER FOR ORE BE MAINTAINED BY A LESSEE AGAINST ONE WHO HAS MINED THE ORE FROM THE LEASED PREMISES?—This question is raised, among others, in *Hartford Iron Mining Co. v. Cambria Mining Co.* (October 4, Montgomery, J.). More precisely stated, it is: Can the lessee of lands containing iron ore maintain trover against a third party, who has mined ore from the same premises, where the terms of the lease require the lessee to mine at least 7,000 tons per year, to pay a royalty of fifty cents per ton upon a total of 7,000 tons whether the 7,000 tons were mined or not, and if less than 7,000 tons were mined the lessor to give the lessee credit upon the unmined ore for what royalty he had paid on the difference between what the lessee actually mined during the year and the 7,000 tons? The defendant claimed that trover could not be maintained against it because plaintiff had no title to the ore in the ground which defendant had taken out, and cited in support of their contention, *Grubb v. Bayard*, 2 Wall. Jr., 81; *Brandt v. McKeever*, 18 Pa. St., 70; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq., 248; *Baker v. Hart*, 123 N. Y., 470; *Gillerson v. Mansur*, 45 Me., 25. These cases undoubtedly sustain

the proposition that a naked licensee, who has not reduced the property to possession has not such a right in the property as enables him to maintain trover. But the present case is clearly distinguishable from those cited by the defendant, for the reason that the lessee was compelled to pay for 7,000 tons whether mined or not, and if that amount was not mined he was given credit upon the unmined portion, thus having an interest in the ore in the land which would enable him to maintain trover if it was mined by third parties.

ANTE-NUPTIAL AGREEMENTS—WILL THEY BAR DOWER?—A recent opinion handed down in the case, *In Re Estate of Pulling*, (October 4, Long, J.), contains an interesting point with reference to the validity of an ante-nuptial agreement as a bar to dower. Just before marriage Pulling and his intended wife signed an agreement, by the clearly expressed terms of which she released all claim which, upon the death of her husband, she, as widow, would have in his estate. The consideration for the release was natural love and affection and five dollars. She, also, signed a paper declaring that she fully understood what she was doing. A third paper appears in the case, signed by Pulling, in which he announces his intention to provide for his wife fully and satisfactorily. It appears that the ante-nuptial agreement was entered into for the purpose of preserving amicable relations with his children by a former wife, who apparently did not relish the second marriage because of the widow's dower. Upon Pulling's death, the probate court assigned the widow her dower interest. The heirs appealed to the Circuit and thence to the Supreme Court, alleging the ante-nuptial agreement as a bar to the widow's dower. If their contention had been supported, the widow would have been cut off without anything for her own support, as her husband had failed to carry out his intention to provide for her, before his death. The Supreme Court decided, that the ante-nuptial agreement did not bar the widow's dower, since she signed the agreement because "she confided in him entirely about doing for her what was just and proper." By common law dower could not be barred by an ante-nuptial agreement, because dower being a freehold estate could not be barred by a collateral satisfaction, and the court might have added, because no right can be barred until it accrues. *Vincent v. Spooner*, 2 Cush., 467; *Hastings v. Dickinson*, 7 Mass., 153; *Logan v. Phillips*, 18 Mo., 22; *Jones v. Powell*, 6 Johns Ch., (N. Y.), 196; *Murphy v. Murphy*, 12 Ohio St., 407. The agreement, in this case, would not bar dower according to the statutes of Michigan, (How. Stat. §§5746, 5747, 5748.), which provide that the jointure shall consist "of a freehold estate, in lands for the life of the wife, at least to take effect in possession or profit, immediately on the death of her husband." The Supreme Court, in this case, follows the very sensible reasoning of *Kline v. Kline*, 57 Pa. St., 120, that the intended wife should not be bound by an ante-nuptial agreement if she failed to exercise her judgment and examine into her intended husband's financial standing. The Pennsylvania court said, "There is, perhaps, no relation in life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such person in the same category with buyers and sellers, and to say that they are dealing at arms length, we think is a mistake—if indeed this agreement was

intended to bar the wife of all future share of her husband's estate in case she survived him, it was a most unequal and unjust bargain. . . . To have instituted inquiries into the property and fortune of her betrothed, would have indicated that she was actuated by selfish and interested motives. She shrunk from the thought of asking a single question. She executed the paper without hesitation and without inquiry. She believed he would propose nothing but what was right and she had a right to exercise that confidence."

IN AN ACTION FOR BIGAMY IS THE FIRST WIFE A COMPETENT WITNESS?—The real question in the case of *People v. Quanstrom* (October 4, opinions by McGrath J. and Morse C. J.) was whether a complaint for bigamy may be made by the first wife, but since one not a competent witness is not competent to make a complaint, the question resolves itself as above. After a thorough review of the authorities, Justices McGrath, Montgomery and Long decide that the wife is not a competent witness, and therefore, cannot make the complaint. Chief Justice Morse and Justice Grant dissent. The common law is that the wife is not allowed to testify. The prevailing opinion decides that the Michigan Statute, Section 7546, amended in 1885, follows the common law, while the dissenting justices are of the opinion that the common law rule is abrogated by the statute. The whole case, therefore, rests upon an interpretation of the statute. The statute says, in effect, that a wife cannot be examined as a witness for or against her husband, "except in cases where the cause of action grows out of a personal wrong or injury done by one to the other." The two opinions differed upon the interpretation of the words "personal wrong or injury." The majority of the justices reason that since bigamy is not a crime against the first wife, a crime being grounded in public injuries it is not a wrong personal to her, and therefore does not come within the exception of the statute. The following cases are reviewed by Judge McGrath: *Bently v Cook*, 3 Doug. 422; *People v Carpenter*, 9 Barb, 580, *Sloan v State* 55 Iowa, 219; *Lord v State*, 17 Neb., 526, *Overton v State*, 43 Texas, 616; *Compton v State*, 13 Texas, App. 271; *State v Armstrong*, 4 Minn., 335; *People v Houghton*, 24 Hun., 335; and *Bassett v United States*, 137 U. S., 496; s. c. 13 Fed. Rep. 237.

The words of Justice Brewer, in the last case, are worth reproducing. He says, speaking for the court: "Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed when he forgets his integrity and violates any human or divine enactment? Is she less sensitive, is she less humiliated when he commits murder or robbery, or forgery, than when he commits polygamy? A true wife feels keenly any wrong, of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relations, but they are rather crimes against such relation than against the wife; and as the statute speaks of crimes against her, it is simply an affirmation of the old familiar and just common law rule."

Chief Justice Morse thinks that bigamy is a "personal wrong and

injury," and he says, "If the word 'personal' is restricted to the narrow sense of a beating or wounding of the person, the act of bigamy may possibly be excluded from the meaning. But I cannot conceive from the meaning of the statute that such a narrow interpretation correctly voices its meaning. Such a violation, as this, of her marital rights, the most sacred and dear to her of any, is certainly a personal wrong. Further, he must believe that the legislature intended that while a wife or husband may make complaint against the other for adultery, they cannot do so in bigamy, which embraces adultery." The dissenting opinion reviews the following cases: *State v Sloan*, 55 Iowa, 217; *State v Hughes*, 58 Iowa, 165; and *State v Bennett*, 31 Iowa, 24.

BOOK REVIEWS.

THE LAW OF ARREST.—By John G. Hawley, of the Detroit, Michigan, Bar. Chicago: T. H. Flood & Co.

This is a hand-book especially adapted for the instruction of officers of the law. It is a small flexible black leather bound volume of sixty-one pages. Mr. Hawley is editor of Volumes 1, 2 and 3 of American Criminal Reports. He is a well-known criminal lawyer, and what he writes upon this subject is the result of considerable research and study. A knowledge of this branch of the law is important not only to police officers but to lawyers and to the people at large. The closing pages of the book are devoted to the rights of private persons to arrest without a warrant, to break doors, to kill, and to arrest for breaches of the peace. In view of the recent labor troubles, particularly those at Homestead, the chapter upon the right of an officer to require private persons to assist in making an arrest is of peculiar interest.

R. S.

AMERICAN PROBATE REPORTS, VOL. VII.—By Charles Fisk Beach, Jr., of the New York Bar. Author of "A Manual of the Law of Wills," etc. New York: Baker, Voorhis & Co.

The value of the American Probate Reports is too well known to be dwelt upon. The seventh volume contains a report in full of all the cases of general interest and value on points of probate law that have been decided in the courts of last resort of the several states since Vol. VI was issued. It contains 691 pages and more than one hundred cases are reported. This series of reports has been very appropriately styled "the cream of probate law;" and Vol. VII is more than a peer of its predecessors. In the selection of the cases much skill has evidently been manifested. To nearly every case interesting notes have been added by Mr. Beach, whose special ability in matters pertaining to probate law, administration of estates, etc., has become quite generally known. Many of the notes are valuable monograms upon the subjects considered. Among those which we have been particularly interested in reading are: Nuncupative Wills, Mutual Wills, Testamentary Capacity, Signing by Mark, Murder of Testator by Beneficiary Under a Will, and the Rule in Shelly's Case.

H. D. J.

PRINCIPLES OF THE LAW OF WILLS.—By Stewart Chaplin, Professor of Law in the Metropolis Law School, New York. New York: Baker, Voorhis & Co.

This handsome book of 530 pages was just issued from the press last month. The main purpose in preparing the book has been to furnish a work especially adapted to the needs of law students; but in carrying out this object the author has avoided the error into which many text writers, who prepare books for students, have fallen. It is not a book which the

student will discard after gaining a few fundamental ideas from it, but it is something which he will always prize as a valuable addition to his library and find very useful in active practice. It is written in a clear and interesting manner, and the principles discussed in the text are illustrated and emphasized by carefully selected cases. In the numerous citations in the notes, the busy lawyer will find a collection of the best and latest authorities upon the various phases of the subject, while the student will find in them, and in the bibliographical notes at the end of each chapter, a direction to the best avenues through which a wider and more technical knowledge of the subject may be gained. Without any intention to disparage the value of the work to the practitioner, we must nevertheless dwell particularly upon its value to the student, as there are so many things about it so particularly adapted to his needs. We expect to see it adopted as a text-book in many law schools.

H. D. J.

MICHIGAN LAW JOURNAL.

VOL. I.

DECEMBER, 1892.

No. 11.

REFORM OF MICHIGAN CIRCUIT COURTS.

HON. EDWARD D. KINNE.

My attention has been called by the editor of the MICHIGAN LAW JOURNAL, to an article printed in the October number thereof, written by Mr. Robert E. Bunker, of Muskegon, upon the topic, "Reform of Michigan Circuit Courts," and I am asked to express my views upon the same subject.

The article is apparently an arraignment of the entire state circuit bench. Until now, I was ignorant of the existence of this public evil. So far as my own district is involved, I am not surprised. I cheerfully plead guilty to the indictment, but as to the remainder of the state, I must interpose a denial.

My acquaintance with my brethren upon the bench, I regret to say is somewhat limited, but near me are Judges Hooker, Peck, Moore, Lane and Kelley. These men were not taken from the inferior walks of the profession, but were in the first rank of the bar of the respective districts. An enlargement of their duties, would probably result in their resignation. It must be remembered that not every circuit has its Bunker, or even its Ashley Pond or Benton Hanchette. They may be numerous in the 14th district, but not elsewhere.

It is possible that in some parts of the state a consolidation is practicable, but the mistake should be avoided, of permitting a congestion of litigation. It is of the first importance that litigants have a speedy determination of their controversies. It is also important, that a circuit judge have all necessary opportunity for the investigation of important questions, and a reasonable time for rest and recuperation.

One of the counties in my district lies contiguous to Ohio. I was flooded with litigation, for no other reason, than that the courts of that state are so clogged, that a final determination could not be expected to be reached in less than five years. I am unable to understand why the fact that a judge can clear his docket at every term, with time for investigation and improvement, must result in "a less efficient administration of justice." I know nothing respecting the merits of any controversy that

may exist in the 14th district, but I am not able to appreciate the propriety of embroiling the whole state in the solution of their problem.

Recently the districts of Judge Peck and Judge Newton were divided, and for no other reason than that they were utterly unable to keep pace with the litigation. Speaking of my own circuit, by working long hours, and with some rapidity, I keep abreast of my judicial duties, holding eight terms of court each year, and some of them extending into the second month. I seriously doubt the ability of my successor to assume the labors of another county, and to discharge his obligations with satisfaction to the bar. It must be remembered that in this state, a circuit judge presides over not only the law court, but the chancery court, which is, practically at least, always in session in all the counties.

The necessity for a radical revision is questionable.

I concur with Mr. Bunker that the salaries of the circuit judges should be increased. As a rule, the service will correspond to the compensation, and labor of the highest skill will usually be found in company with the best salaries. No one can reasonably expect to secure and permanently retain upon the bench the best lawyers of the state upon a salary of \$2,500.

Twenty-second Circuit, Ann Arbor, Mich.

HON. FRED H. ALDRICH.

Perhaps there is nothing more annoying to the bar of this state than the lack of uniformity in the practice in our circuit courts. Not only does a large number of the thirty-three judicial circuits have each a separate set of rules but in many circuits the court in each county is provided with its own lists, while in others a portion of the counties have no special court rules, but are governed by the general rules.

In some of the oldest circuits the rules have never been revised but have been simply added to, as the exigencies of the case seemed to require. One circuit judge would make such rules as he thought necessary. After his term of office expired his successor's attention might be called to some matter of practice that should be regulated by a rule, to be entered for that purpose, whereupon a new rule would be made without any reference being had to the rules already in existence to see whether the matter was treated of under some rule that had gone into neglect and disuse.

I think that I can safely say that there are judicial circuits in this state, some of the rules of which are not known of, by either the judge or any member of the bar therein. The special rules now actually in use in the several circuits and counties in the state vary from none at all, to seventeen. Except in a very few instances rules that would be good and sufficient in one, would answer the purpose equally well in every other county. One of the excepted cases is in the matter of making defaults absolute. The terms of court in certain counties frequently do not last more than one or two days. In such counties a rule allowing default to be

made absolute after one day in term would be advisable, while it would be unnecessary in the older counties of the state.

To illustrate difficulties that may frequently arise: In many counties if a jury is not demanded and the jury fee paid ten days before the first day of term the right to demand a jury is deemed waived. In certain counties, if a note of issue is not filed ten days before the first day of the term at which a case is noticed for trial, it will not be placed upon the calendar unless upon cause shown, or as is the case in some counties, unless by the consent of the opposite party. In other counties no such rules as these exist, and it is not unfrequently the case that an attorney goes to a distant part of the state with his witnesses to try a cause, after having taken every step which would be necessary to bring such cause to trial, were it to be tried in the county in which he resides, and finds, after having put his clients to great expense, that owing to his failure to observe some special rule of the court where the case is to be tried, that such expense was incurred in vain.

Such circumstances would be less frequent if each circuit judge would, so far as practical, adopt but one set of special rules for his entire circuit and make those rules correspond as near as may be with those of other circuits.

One case of complaint among attorneys is the different manner in which judges exercise their discretion in fixing costs in cases appealed from justice courts. In many cases attorneys on both sides insist that their respective clients should be allowed full costs. To a great extent the difficulty in such cases could be avoided by the judge making a rule as to the question of costs to be followed in ordinary appeal cases, but leaving the parties in all cases the right to appeal to the discretion of the court as provided by statute.

The rules in every county should be printed in the calendar for each term.

The manner of the examination of candidates for admission to the bar is another striking example of wrong and injustice resulting from the lack of uniformity in the practice of our circuit courts. A man in one county will be given a certificate entitling him to practice in every court in the state, when, if he had gone to any other court in the state he would have been determined to be incompetent to practice law at all. Again, another man, much better qualified, may apply to the same court from which the former obtained his license, but under a different committee, and after passing a better examination, be sent back to his books.

If the practice of admitting candidates to the bar upon examination in the circuit courts is to continue, some method should be adopted whereby such examinations would be made more uniform. I would suggest as one method that the candidate be required to notify the clerk of the supreme court of his intention to apply for admission to the bar, stating the court to which, and the time at which, he would make his application, and that

thereupon, providing a necessary fee was enclosed, it should be the duty of the said clerk to transmit to the clerk of the said circuit court a list of questions approved by one of the justices of the supreme court. This is one of several methods that have occurred to me; space forbids entering into details, or further discussion of the question.

Twenty-eighth Circuit, Cadillac, Mich.

HON. GEORGE P. COBB.

The system embracing the circuit and supreme courts is one and whatever affects one has its influence on the other. Some of the most desirable reforms cannot, probably, be had in the present state of public opinion. One of these is the abandonment of the plan of choosing judges and prosecuting officers by popular election. All should be appointed by the executive. This implies no impeachment of the intelligence of the people. From the very nature of the subject it is impossible for the mass of voters to know the relative fitness of opposing candidates. It is safe to say that not two per cent. of those who this fall voted for Judge Newton or Judge Hooker, knew or could know whether either possessed the essential qualifications for a high judicial office. The choice will always be governed by other considerations. Partisan newspapers on each side will extol their own candidate and belittle the other, and the voter, having no confidence in either and no knowledge of the qualifications of the candidates, will vote his party ticket.

Less careless and more intelligent legislation and (its natural result) less frequent changes in the statutes, would reduce the volume of business in all the courts. But can this be hoped for at present?

Good can be done by redistricting the state so as to reduce the number of circuits and equalize the amount of work in them, but I doubt whether they can safely be reduced to twenty. While the business of some counties is temporarily falling off, that of others is increasing. This kind of business follows the tendency of all business to concentrate in the large towns. In connection with this re-organization of the circuits (or else without it) provision should be made for better salaries for the judges and the payment of their traveling expenses. I believe they are the only state officers who are now required to travel about the state on official business at their own expense.

The suggestion has been made, and merits consideration, that several judges be assigned to one large circuit and required to hold court alternately in each county.

There should be a different system of admission to the bar. No one should be admitted except on a public examination in the supreme court. The candidate should make it appear not only that he has read a few law books or spent a few months in a law office or a law school, but also that he has the requisite legal learning, general intelligence, mental develop-

ment and moral stamina to render him a safe counselor in important affairs. He should have, at least, a thorough academic education, or its equivalent, however obtained.

The method of selecting jurors is defective, but perhaps the only reform now possible can be secured by providing jury commissions similar to those of Wayne or Saginaw counties for some of the counties containing large towns. And Sec. 978 of How. Stat. should be repealed.

The circuit court rules and chancery rules need revision. Much might be said of the changes above hinted at, and others, but the subject is too large to be treated in the space allowed.

Eighteenth Circuit, Bay City, Mich.

HON. J. B. MOORE.

My attention is called to an article written by Mr. Robert E. Bunker recently published in the MICHIGAN LAW JOURNAL, entitled "Reform of Michigan Circuit Courts," and I am requested to express my views upon the same subject. I read the article with care and am yet in doubt as to what feature of the circuit courts of the state it is that needs reforming. I am quite agreed with the writer that we could get along with fewer circuits and that the pay of the judges ought to be more liberal. A judge who has no children to educate and whose family does not care for social display can live in our country towns very comfortably on the salary now provided, but if he has a family to educate he would be unable to do it upon the present salary, and in any event could not hope to accumulate a fund for his old age. Larger circuits and better pay would be quite as well for the people and much better for the judges.

I believe the work of the Michigan circuit courts will compare favorably with the work of courts of like jurisdiction and powers anywhere. I know of a number of circuits where an opportunity is given four times each year to try every case on the docket, and if any case is not tried it is the fault of the lawyers rather than the court. I also know of at least one circuit where all the work of a given term is concluded, including the disposition of chancery causes, before the work of another term is commenced.

The fact that both of the great political parties selected their candidates for judges of the supreme court from the circuit judges, and that nearly all the leading candidates in convention were circuit judges, indicates that the people have confidence in the honesty and ability of the circuit courts. If in any circuit, outside of possibly two large cities, the business of the court is delayed and is accumulating, I think a remedy would be found in the election of a judge who had tact and business capacity as well as legal learning. I believe many judges make a mistake in not deciding the cases submitted to them, especially the chancery cases, promptly. The circumstances should be exceptional that will justify a

judge in allowing cases that have been argued and submitted to accumulate. To resume then, let us have fewer judges who shall be better paid. Let them possess not only legal learning but promptness of decision and capacity to dispatch business.

Sixth Circuit, Lapeer, Mich.

HON. ROLLIN H. PERSON.

I have read with interest Mr. Bunker's article on "Reform of Michigan Circuit Courts." That, as a system, they are failing to give satisfaction, is news to me. I had not heard the complaints spoken of, although meeting almost daily leading lawyers from various parts of the state in attendance upon the supreme court. Certainly we have many very able and competent circuit judges. The people find no trouble in selecting from their number suitable candidates for the highest tribunal.

Circuits should not be too large. At least a judge ought never to feel anxious and hurried because of an overcrowded docket. Personal and property rights are not to be hastily disposed of. Each litigant is entitled to the best judgment which even a circuit judge can give consistent with a fair dispatch of business. Overwork never results in clearer views nor in improved temper. Besides this the judge must have time to keep fully up with current decisions and the course of affairs in general. With these things in view a circuit should be large enough to fairly occupy his whole time. If any fall below this their size may well be increased; if any go beyond it they ought to be cut down. A circuit that is too heavy is worse than one that is too light. Some changes may be necessary on the basis I have mentioned, but they ought not to be made with the curious idea of cutting the number to a fixed and unalterable figure. Most of the circuits with which I am acquainted are large enough. This one certainly furnishes a sufficient amount of work.

It seems to the profession, and correctly I think, that the salaries of the judges might very properly be increased. It is doubtful, however, if the people at large so look at it. They will wonder why another advance is required when prices generally are still falling, and will ask why lawyers of to-day need so much more than the eminent men of a few years ago. They may even stop to enquire whether the increase already made has improved upon Green, Turner, Lovell, Sutherland and others at the circuit, or upon Christiancy, Campbell, Cooley and Graves on the supreme bench. If there has been an improvement they may wish to know why the writer of the article mentioned is still so bitterly complaining of the inefficiency of our courts.

In truth increased salaries have no tendency to give better judges. We have localities now which not only afford the most ample opportunities for choice, but pay very large compensation, yet it is not generally claimed that the able and learned gentleman there selected rank, as a class, above the other judges of the state.

It would seem unwise to agitate the question of increasing the circuit judges' pay just when the very strongest efforts are needed to give the supreme court that relief which is actually indispensable.

Thirtieth Circuit, Lansing, Mich.

HON. JOHN W. STONE.

My attention has been called to the article in the October number of the MICHIGAN LAW JOURNAL, by Mr. Bunker on "Reform of Michigan Circuit Courts." It is always quite easy to criticise present systems, and raise objections to existing things, but not so easy to recommend and bring about wise changes. Considering the low salaries which the state of Michigan has always paid her circuit judges, I think it remarkable that, for so many years, she has been so faithfully and efficiently served in this department of government. I have no doubt, however, that the present system might be materially improved by a reduction of the number of circuits, and the increase of the salaries of the judges. But the two changes should go hand in hand. I presume that the small salary paid has had a tendency, in some parts of the state, to increase the number of circuits, and thus lesson the labor and expenses of the judge; but in more instances political, sectional and personal considerations have controlled. An increase of salary to at least \$5,000 per annum, and a decrease of the number of circuits to say twenty in number, judiciously apportioned, would no doubt be a step in the right direction. The difficult thing to accomplish, in the light of our history, is to get the people to vote for an increase of salary. It is easy enough to say it should be done, but it is quite another thing to bring it about. Quite recently a Michigan farmer said to one of the justices of the supreme court "I suppose you get a big salary, probably as much as a \$1,000 a year?" This was the farmer's idea of a large salary, and until the voters can be lead to believe that a judge who devotes his time and talent to important judicial work should be paid as much as a first-class book-keeper in a large business, there is but little use of talking or writing about increased salaries.

In the Upper Peninsula of the state the question of salary is not so great an embarrassment, because the several counties acting through their boards of supervisors have the power (and generally exercise it) to pay the judges additional compensation. The state and community are largely interested in the ability and efficiency of the circuit judges, and it is altogether likely that a reasonable increase of salary would improve the personnel of the circuit bench.

A suggestion or two as to our jury system. The manner of selecting jurors in the Upper Peninsula works well. The county clerk, judge of probate, sheriff and county treasurer of each county constitute a board for the purpose of selecting the annual list of petit jurors. I think it an improvement upon the system in force in lower Michigan, and I have

never heard that any abuse in practice has resulted. The circuit courts are embarrassed frequently in the matter of jurors by the large number of persons who claim exemption from jury duty by reason of their enrollment as contributing members of military companies under the provisions of Section 978 of Howell. One hundred and fifty contributing or honorary members are allowed to be enrolled in each company or battery. These, taken with the large number of other exemptions, which embrace all firemen organized under the statute, render it almost impossible at times in some communities to obtain competent jurors. The military is in no way benefitted, except financially, and the state could better devise some other means of financial aid not so injurious to the jury system. I think that this statute should be repealed.

In conclusion, if I were to make any recommendation to reform the circuit courts in this state it would be along this line:

1. Submit a constitutional amendment increasing the salaries to at least \$5,000.
2. If this measure prevailed, reduce the number of circuits to, say, twenty.
3. Provide that no circuit judge should be permitted to practice law in any state court during his term of office.
4. Improve the jury system as above indicated and otherwise.
5. In practice and theory divorce the judiciary from party politics—*Twenty-fifth Circuit, Marquette, Mich.*

PROTECTION OF NATURALIZED CITIZENS.

PROF. HENRY A. CHANEY.

In one of the closing chapters of that history of England which Dickens wrote for children, he refers to the United States as a country, that is "honorably remarkable for protecting its citizens wherever they go." It was doubtless the Martin Koszta episode that inspired this generous praise from one who had not always been an indulgent critic; for when he wrote, that international incident had but lately taken place. Within six years afterwards, however, the novelist's words were quoted by *Harper's Weekly* as the most cutting sarcasm he had ever uttered. "For it is well known," says the paper, "that, in many parts of the world. American citizens have been or are still compelled to feign to be Englishmen in order to insure safety for their lives and property."¹

Novelists and newspapers are not commonly regarded as final authority upon questions of international law; but, in this case, though far in advance of the books and of statesmen, they seem to have had the right idea of national obligations. The development of that idea in the history of diplomacy is an interesting study, showing as it does, the gradual but certain change, more or less compulsory, no doubt, from the despotic to the republican principle. It is interesting also to see that the first expression on the subject came from Henry Wheaton, soon to become, as he has since remained, the leading American authority on international law, and was contained in a letter written by him as United States minister at Berlin, to Johann P. Knocke, in 1840. Knocke, who was born a Prussian, came to the United States in 1834, when he was already of age; he became naturalized, but returning to Prussia was required to perform military duty, whereupon he appealed to Mr. Wheaton, who declined to interfere. "Had you remained in the United States," wrote he,² "or visited any other foreign country (except Prussia), on your lawful business, you would have been protected by the American authorities, at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But, having returned to the country of your birth, *your native domicile and national character revert*, (so long as you remain in the Prussian dominions), and you are bound in all respects to obey the laws exactly as if you had never emigrated." This artificial notion makes one suspect that however well-read Wheaton may have been as a lawyer, he could never have been a statesman of the first

¹ *Harper's Weekly* (1859), vol. 3, p. 2.

² *Senate Documents*, 1859-60, vol. ii, p. 6.

class. A naturalization that does not protect one from the only power that is likely to meddle with him, is about as much of a safeguard as the freedom of a city.

When this question thus came to the surface it found still in dispute a related principle for which, some thirty years earlier, the United States had gone to war, but which still remained unsettled, and was to remain so for some time longer. This was the right which England claimed of impressing seamen of British birth from American vessels. On closing his correspondence, in 1842, with Lord Ashburton, upon matters in dispute between their respective governments, Daniel Webster discussed the question of impressment, and after referring to the English doctrine of "the perpetual and indissoluble allegiance of the subject, and his obligation under all circumstances and for his whole life, to render military service to the Crown whenever required," he made this declaration: "The American government, then, is prepared to say that the practice of impressing seamen from American vessels cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as cannot be submitted to. In the early disputes between the two governments on this so long contested topic, the distinguished person to whose hands were first entrusted the seals of this department, declared that 'the simplest rule will be that the vessel being American shall be evidence that the seamen on board are such.' Fifty years experience, the utter failure of many negotiations, and a careful re-consideration, now had, of the whole subject, at a moment when the passions are laid and no present interest or emergency exists to bias the judgment, have fully convinced this government that this is not only the simplest and best, but the only rule which can be adopted and observed, consistently with the rights and honor of the United States and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. In every regularly documented American vessel the crew who navigate it will find their protection in the flag which is over them."¹

The question here, of course, so far as citizenship is concerned, was a narrower one than that which is involved in the protection of naturalized citizens revisiting their native lands and there detained for military service. And on the other hand, it involved the element, absent in the latter case, of an affront to the flag. But in respect to the doctrine of perpetual allegiance, and the obligation resting upon this country to protect its naturalized citizens, there is no essential difference; and this enunciation of American doctrine by Mr. Webster, just fifty years ago, may be taken as a starting point for an examination of the question how far the United States have faithfully lived up to it.

¹ Webster's Diplomatic and Official Papers, p. 101.

Ten years later, when Webster was secretary of state for President Fillmore, the same principle was reiterated in the annual message in precisely the same language, but with a noticeable addition. The President said: "The principle which this government has heretofore solemnly announced, it still adheres to, and will maintain under all circumstances and at all hazards. That principle is that in every regularly documented merchant vessel the crew who navigate it, *and those on board of it*, will find their protection in the flag which is over them. No American ship can be allowed to be visited or searched for the purpose of ascertaining the character of individuals on board, nor can there be allowed any watch of the vessels of any foreign nation over American vessels on the coast of the United States or adjacent thereto."¹

But it is to be noted in the first place that Webster himself did not follow his own reasoning the length of shielding the naturalized citizen when in his native land. In his correspondence with Lord Ashburton he had said, "If this notion of perpetual allegiance, and the consequent power of the prerogative, was the law of the world; if it formed part of the conventional code of nations, and was usually practised, like the right of visiting neutral ships, for the purpose of discovering and seizing enemy property, then impressment might be defended as a common right, and there would be no remedy for the evil till the national code should be altered. But this is by no means the case. *There is no such principle incorporated into the code of nations.*" Then, after saying that England herself assists the emigration of her poorer classes, many thousands coming annually to the United States, and that these "mingle with the new community in which they find themselves, and seek means of living; some find employment in the cities, others go to the frontiers to cultivate lands reclaimed from the forest, and a greater or less number of the residue, becoming in time naturalized citizens, enter into the merchant service under the flag of their adopted country,"—he continues: "Now, my lord, if war should break out between England and a European power, can anything be more unjust, anything more irreconcilable to the general sentiments of mankind, than that England should seek out such persons, thus encouraged by her and compelled by their own condition to leave their native homes, tear them away from their new employments, their new political relations, and their domestic connections, and force them to undergo the dangers and hardships of military service for a country which has thus ceased to be their own country? Certainly, certainly, my lord, there can be but one answer to this question. Is it not far more reasonable that England should either prevent such emigration of her subjects, or that, if she encourage and promote it, she should leave them not to the embroilment of a double and contradictory allegiance, but to their own voluntary choice, to form such relations, political or social, as they see fit

¹ President's Message, 1851; Senate Executive Doc. 1, 32d Cong., 1st Session.

in the country where they are to find their bread, and to the laws and institutions of which they are to look for defense and protection?" One would think that this argument was as good by land as by sea, but Mr. Webster still left the door open to say, as he did say in 1852, in a brief note concerning M. Victor B. Delpierre, a naturalized Frenchman, that "if, as is understood to be the fact, the government of France does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully claim their services *when found within French jurisdiction*."¹

Mr. Webster died in October, 1852, and Edward Everett became secretary of state. Mr. Everett had occasion to send instructions on the subject to Mr. Barnard, then United States minister at Berlin, and while he treated the question with characteristic caution, declining to discuss the doctrine of inalienable allegiance, he said: "the president is of opinion that if a subject of Prussia, lying under a legal obligation in that country to perform a certain amount of military duty, leaves his native land, and without performing that duty, or obtaining the prescribed certificate of emigration, comes to the United States, and is naturalized, and afterwards, for any purpose whatever, goes back to Prussia, it is not competent for the United States to protect him from the operation of the Prussian law."²

It was the prompt and peremptory conduct, some six months later, of a naval captain, acting under off-hand and informal instructions from a minor diplomatic functionary, that precipitated the Koszta case, and compelled Secretary Marcy either to disavow or to justify their course. The secretary boldly took the extreme position. Koszta was not, as a matter of fact, a citizen of the United States—not even a naturalized citizen. He was one of Kossuth's captains in the Hungarian uprising against Austrian rule, and on its failure had fled, as his leader and many others did, into Turkey. Austria had demanded the surrender of these refugees, and Turkey, while she refused to surrender them, had agreed that they should leave the country. Koszta accordingly came to the United States. Within two years later he sailed again to Turkey in an American vessel, and applied to the American consul at Smyrna for protection. As all he had ever done towards his naturalization was to declare his intention of becoming a citizen, the consul had some doubt, but finally, in conjunction with the consul-general at Constantinople, he furnished him a letter of safe-conduct of a kind recognized by the Turkish law. His business in Turkey is said to have been of a private and temporary character, and, after it was finished and while he was waiting for a chance to return to the United States, he was seized by some Greek rowdies, supposed to have been hired for the purpose by the Austrian consul-general, treated roughly, forced to go out in a boat with them, and was then thrown in the harbor. A boat-crew from the Austrian war-brig "Huszar" was in waiting to "rescue" him, and on pulling him out of the water they took him on board

¹ Senate Documents, 1859-60, Vol. xi, p. 55.

² Senate Documents, 1859-60, Vol. xi, p. 55.

the brig, where he was put in irons. The consular officers promptly asserted his American nationality, and producing his declaration of intention in proof of it, made application for his release. They appealed not only to the commander of the brig, the Austrian consul-general at Smyrna, and the Austrian internuncio at Constantinople, but also to the Turkish authorities. The internuncio refused to release him and the Turks would not actively interfere. It was rumored in the course of a few days that it was intended to carry Koszta to Trieste, but meanwhile Captain Duncan N. Ingraham, commanding the United States sloop-of-war, "St. Louis," came sailing into the harbor of Smyrna, and on being informed of the situation asked Consul-General Brown what he should do. Ingraham was a South Carolinian whose father had fought with Paul Jones in the "Bon Homme Richard" and Brown was a nephew of Commodore David Porter of the "Essex." Excess of caution was probably not a fault of either. The consul-general told the captain to "take him;" whereupon Ingraham, sending word at eight in the morning, informed the Austrian commander that his instructions required him to demand the surrender of Martin Koszta, and adding that if the prisoner were not delivered by 4 p. m., he should "take him," cleared his decks and ranged alongside. These conditions left little margin for delay, and by eleven o'clock the French consul-general had been constituted a sort of receiver to take charge of Martin until his status should be determined. Austria then addressed a circular letter to the various European powers, complaining of Ingraham's action as a violation of international law, and Baron Hulseman, the Austrian charge d'affaires at Washington, called the United States government to account. Secretary Marcy declined to disavow the acts complained of or to give satisfaction. He said it was neither the doctrine of international law nor the practice of nations to restrict protection to those only who were native-born or naturalized citizens. Koszta had acquired a domicile in this country, and this had invested him with its national character, together with the right to claim the protection of its government. Nor was domicile lost by temporary absence on private business, and with the intention of returning. And so far as continued allegiance to Austria was concerned, that had been ended by Austria's own act, for she had procured from Turkey the banishment of Koszta, who was, besides this, by the terms of a decree of 1832, an "unlawful emigrant" who had lost all civil and political rights by leaving his country without permission. And, in any case, Austria had no jurisdiction to seize him in Turkish territory, and the Ottoman porte itself had protested against the act as a violation of its sovereignty, while it had made no complaint whatever of the conduct of the Americans. The Secretary also said: "There is great diversity and much confusion of opinion as to the nature and obligations of allegiance. By some it is held to be an indestructible political tie, and though resulting from the mere accident of birth, yet forever binding the subject to the sovereign; by others it is considered a political connexion in the nature of

a civil contract, dissoluble by mutual consent, but not so at the option of either party. The sounder and more prevalent doctrine, however, is that the citizen or subject, *having faithfully performed the past and present duties resulting from his relation to the sovereign power*, may at any time release himself from the obligations of allegiance, freely quit the land of his birth or adoption, seek through all countries a home, and select anywhere that which offers him the fairest prospect of happiness for himself and his posterity."¹

The release of Koszta, which followed this correspondence, made Marcy famous and added greatly to the credit of his country abroad. The secretary had embodied in language of extraordinary force and beauty a doctrine which, if correct, entitled every naturalized citizen to protection wherever he went. But Marcy was as shy as Webster had been of asserting this doctrine as against a parent nation reclaiming a former subject. The volume of European immigration, though fluctuating greatly, reached in 1854 a considerably higher figure than it ever had previously; out of 427,000 from all the countries of Europe, 206,000 were from Germany; nearly 9,000 Prussians came over, and this was almost three times the highest number that had ever come before in any one year from that kingdom; larger numbers than ever were, no doubt, from time to time revisiting their old homes, and instances of the arrest of individuals by the authorities were becoming more and more frequent. Prussia was steadily pursuing her policy of impressing into her military service such naturalized Americans of Prussian birth as came within her reach. In the summer of 1855, John Statz, who described himself as a musketeer in the Thirtieth Infantry at Cologne, was arrested at night in that city, having gone there to attend to some family business and having remained there undisturbed for some three months. He had emigrated to the United States in 1849, when sixteen years old; in January, 1855, he was naturalized, and in April he went back to Prussia. The American minister to Berlin at the time was Peter D. Vroom, who had once been governor of New Jersey; Statz appealed to him and very strongly urged the Koszta case as a precedent that more than covered his own. Vroom shrank from asking his release from Baron Manteuffel, but kept up a correspondence with Marcy on the subject which dragged through fifteen months and resulted in nothing but Marcy's approval of Vroom's timid and dilatory procedure.²

It is not strange if matters grew rapidly worse with such management, nor that under Buchanan's weak administration the government became an object of contempt to foreigners. Buchanan's Secretary was General Cass, who closed in the Department of state a long and useful public career in which he had shown strong and aggressive characteristics. But he was seventy-five years old when he took the portfolio, and at that age a man's

¹ Message and Documents (1853-4), Pt. 1, p. 33; 33 Cong., 1st Sess., Sen. Doc. 1.

² Senate Executive Document 88, 36th Cong., 1st Sess., pp. 90-108.

disposition is to avoid quarrels instead of beginning them. But his minister to Berlin was Joseph A. Wright, for eight years previously governor of Indiana, and a very different man from Vroom. Just before leaving his post, Vroom had received from one Bonifaz Glahn a complaint like that which had proved unsuccessful in the case of John Statz. Bonifaz had come to the United States before he was sixteen years old, and had settled in Illinois and learned a trade. At twenty-three he was ready to set up in business, but he wished first to revisit his father and sister in Germany. On reaching his native place he took his passport and certificate of citizenship at once to the local authorities, who promptly deprived him of them, arrested him, and sent him to the royal depot whence he was transferred to an infantry regiment. The American minister bestowed his sincere sympathy upon him but said he could do no more, though he would forward his complaint to Washington. About the first thing Governor Wright did, after taking charge of the legation, was to ask instructions in this case from General Cass, because, as he said, similar cases were being presented. It does not appear that he got any instruction, for a whole year passed before the subject was revived, and what became of Glahn, the red books say not. But, on the 21st of September, 1888, Mr. Wright wrote Cass that the cases presented were numerous and must, in the nature of things, increase. He asks why not find a remedy. "May not the infant from Prussia," says he, "raised under our flag from childhood to three score and ten, return to his native land, see his relatives, settle up his business," etc.? A week later he wrote again: "No American consul or minister can shield from impressment a United States citizen who has the misfortune to be born in Prussia. Is it possible that there is no remedy for this state of things? My opinion is that if a decided and firm stand be taken by our government, during the present peculiar position of affairs in Prussia, it will lead to good results." Cass answered fretfully that "the process by which the necessary supply of men is provided for the military establishments of continental Europe is contrary to our ideas of personal right, but we have no right to ask that it be changed and made to accommodate itself to our standard." And he adds: "It is understood that a document is issued by the authority of the Prussian government to all its subjects desirous of leaving the country, with a view to establish themselves elsewhere, called a certificate of emigration, which exonerates such persons from the penalties arising out of their liability to serve in the army, should they return to Prussia. If such a certificate is fairly issued, as a matter of course, upon application, and with reasonable fees only to the proper officers making out the papers, and if its legal effect be to remove the obligation which would otherwise exist, I can conceive no just reason why any person not ignorant of his ability to obtain such protection should leave Prussia without providing himself with it. . . . It may happen that, by some accident or misconception, a person may leave Prussia without this muniment of safety; but

unless so prevented such emigrant is inconsiderate in his departure, and still more inconsiderate in his return."¹

The confessed inability of the United States to protect its naturalized citizens began to be felt as something of a scandal, and in February, 1859, Senator Pugh, of Ohio, called for the correspondence on the subject. It was not sent to the senate for several months, and meanwhile some new incidents arose that helped to bring matters to a focus. In answer to an inquiry from M. Felix Leclerc, of Memphis, General Cass wrote in May, in much the same language as Webster had used in Delpierre's case, that it was "understood that the French government claims military service from all natives of France who may be found within its jurisdiction. Your naturalization in this country," he added, "will not exempt you from that claim if you should voluntarily repair thither."² *Harper's Weekly*, which was then excoriating the Buchanan administration for its "imbecile policy," at once published the Leclerc letter with comments so stinging that the editor presently received from Washington, from what he called "an obvious source," an explanatory note defending the secretary and saying that "General Cass' doctrine is the true one, and it will keep us out of many difficulties in future."³ This was in June, and a few days later General Cass wrote Mr. Hofer, of Cincinnati, that "the position of the United States, as communicated to the minister at Berlin for the information of the Prussian government, is that native born Prussians naturalized in the United States and returning to the country of their birth are not liable to any duties or penalties except such as were existing at the period of their emigration. If at that time they were in the army or actually called into it, such emigration and naturalization do not exempt them from the legal penalty which they incurred by their desertion, but this penalty may be enforced against them whenever they shall voluntarily place themselves within the local jurisdiction of their native country and shall be proceeded against according to law."⁴ What General Cass really said was not so explicit as what he here says he said, but this recital fairly states the conclusion to which he presently came, and which Marcy had reached in the Koszta case six years before. And having an opportunity a few days afterward of demanding from the little kingdom of Hanover the release of Christian Ernst, who had gone to the United States when eighteen years old and had been seized for military service upon his return some nine years later, the secretary acted with promptness and considerable decision.⁵ Ernst had perfected his naturalization but a few weeks before he sailed, and it might be inferred that he did so for the very purpose of keeping out of the clutches of his former king. General Cass, oblivious of

¹ Senate Ex. Doc. 38, 36th Cong., 1st Sess., pp. 120, 121.

² *Harper's Weekly*, vol. 3, p. 370.

³ *Id.*, p. 402.

⁴ Senate Ex. Doc. 4, 40th Cong., 1st sess., p. 5.

⁵ Senate Ex. Doc. 38, 36th Cong., 1st sess., p. 132.

the much more meritorious cases of Statz and Glahn, expatiated upon the absurdity of contending "that a boy brought to this country from a foreign country with his father's family when but twelve years old and naturalized here, who should afterwards visit the country of his birth when he had become a man, might then be seized and compelled to perform military service, because if he had remained here throughout the intervening years and his life had been spared he would have been bound to perform military service." The Hanoverian government politely disputed the right of the United States to make the demand, but as a matter of grace and favor discharged Ernst from their army.

The American minister to France during the last eighteen months of Buchanan's administration was an impulsive and headlong Virginian named Charles J. Faulkner, whose son and namesake is now a senator from West Virginia. What manner of man the elder Faulkner was may be gathered from the facts that he had once proposed in the Virginia house of delegates the gradual abolition of slavery, and had afterwards denounced slavery in Congress, while on the other hand he had framed the fugitive slave law, and when the rebellion broke out had tried, it is said, to enlist the aid of Napoleon III for the confederacy. On his recall he was sent to Fort Lafayette, and when he was released from that political prison he took part in the war as an aide on Stonewall Jackson's staff. But as a diplomatic functionary he did his country the service of stating the doctrine as to naturalized citizens with such force and clearness that his words are quoted to this day as a satisfactory exposition of the American view. One Michael Zeiter, born in a Rhenish canton of France, had left that country at the age of sixteen and had come to the United States, where he was naturalized at twenty-two. When twenty-nine years old he returned to his native place, and was compelled, against his protest and in spite of his naturalization papers, to submit to the conscription. He appealed to the council of revision and at this stage Mr. Faulkner intervened with a vigorous note to M. Thouvenel, the minister of foreign affairs, in which he stated "our doctrine to be that the naturalized emigrant cannot be held responsible upon his return to his native country for any military duty, the performance of which had not been actually demanded of him prior to his emigration. *A prospective liability to service in the army is not sufficient.* The obligation of contingent duties, depending for their exaction upon time, sortition or events thereafter to occur, is not recognized. To subject him to such responsibility *it should be a case of actual desertion*, or a refusal to enter the army after having been actually drafted, or called into it, by the government to which he, at the time, owed allegiance."¹ Substantially the same position, not quite so explicitly set forth, had been taken the year before by John Y. Mason, Faulkner's predecessor, in his correspondence with Count Walewski, but Walewski had managed to evade it and General Cass had not insisted

¹ Senate Ex. Doc. 4, 40th Cong., 1st Sess., pp. 16, 17.

upon the persistent repetition of it, though he expressed his approval of both letters. But Faulkner was persistent and soon had the satisfaction of reporting the release of Zeiter. Upon this precedent, Minister Dayton obtained the release of others during the war, and Minister Bigelow, after it.

During the war, however, Secretary Seward was naturally disinclined to engage in any controversy that could be avoided, especially with powers that were disposed, like Prussia, to be friendly. He wrote to Minister Judd at Berlin, with regard to certain cases, that they "happened very inopportunistically. It is hardly a right of a citizen in pursuit of merely personal objects in a foreign country to draw this country into a controversy with a foreign power when we are struggling with insurrection at home and when the practice of some self-denial on his part would enable us to postpone the debate until a more favorable season."¹ And he instructed the minister not to interfere "where Europeans who have become naturalized citizens of the United States have left the country when their services were required, and returned to Europe to avoid needful military duty here, and then have invoked the protection of the United States to screen them from military duty there."² Again, he said: "Citizens of the United States, in the present emergency, ought rather to be at home upholding the government against domestic insurrection, than to be adding to its embarrassments by invoking the exercise of its authority for their special relief in foreign countries."³ But the war was barely over before he instructed Minister Wright, who had been re-appointed, to present the subject to the serious consideration of Count Bismarck. "The question" said he, . . . "is an old one, and was a subject of elaborate discussion between the two countries before the occurrence of our late civil war. Considerations of ease and policy prevailed with this department to allow the subject to rest during the continuance of the war. We became even less anxious upon the subject when it was seen that worthless naturalized citizens fled before the requirements of military service by their adopted government here, and not only took refuge from such service in their native land, but importunately demanded that the United States should interpose to procure their exemption from military service exacted there. Those circumstances, however, have passed away, and the question presents itself in its original form. The United States have accepted and established a government upon the principle of the rights of men who have committed no crime to choose the state in which they will live, and to incorporate themselves as members of that state, and to enjoy henceforth its privileges and its benefits, among which is included protection. This principle is recommended by sentiments of humanity and abstract justice; it is a principle which we can-

¹ Senate Ex. Doc. 4, 40th Cong., 1st Sess., p. 90.

² *Id.*, p. 111.

³ *Id.*, p. 112.

not waive."¹ In 1867 the North German Union was formed, and the historian Bancroft being then minister, resumed the discussion with its foreign office. He produced the old Roman law, and showed that it coincided exactly with the principle asserted by the United States. He urged, moreover, that this principle had been practically conceded by England, and deliberately confirmed by France.² Shortly afterwards he signed the treaty of 1868 whereby naturalization and five years' uninterrupted residence would entitle a resident of either country to recognition by the other as a citizen thereof.

That same summer, however, the question ran some risk of complication in consequence of the Fenian movement. It was a presidential year also, and devotion to foreign-born citizens was doubtless a card to play. Some one introduced in the House of Representatives a most uncompromising bill, authorizing the President to suspend commercial relations with any nation that presumed to meddle with any naturalized American, and forbidding any department of the government to deny or question the right of expatriation. John Conness, a Californian senator of Irish birth and a republican, engineered the bill in the senate. The debates throw little light on it, but rather indicate that it was aimed at Great Britain, and was perhaps a bit of political tail-twisting for campaign purposes. It is noticeable that even at this date some of the leading lawyers of the senate, like Sumner, Fessenden and Morrill, declined to commit themselves to any such proposition as that the right of expatriation was one that was recognized at law. The general subject was examined this same year by a British commission of which Lord Tenterden was secretary and which included among its members such illustrious publicists as Phillimore, Forster, Baron Bramwell, Lord Selborne, Vernon Harcourt and Montague Bernard.³

It was a natural consequence of the success which the United States had now begun to achieve in protecting its naturalized citizens abroad that this protection should soon be abused by unscrupulous adventurers, and General Grant's administration had to deal with several cases of this kind. Among them were those of Leopold Ungar and Francois Heinrich, both of whom had returned permanently to Europe and only used their American citizenship as a cloak.⁴ The government refused to interfere in such cases. But there were still several continental governments which had not been brought to acquiesce in the American doctrine. Italy had not, for one, and there was one flagrant instance in which the United States failed to obtain the release of a man who had been brought from Italy by his parents when only two years old, had grown to manhood in California, and had been duly naturalized, but on a temporary visit in 1875 to his

¹ Senate Ex. Doc. 4, 40th Cong., 1st Sess., p. 90.

² Message and Documents, 1867-68, Dep't State, Part I, p. 587.

³ Message and Docs. 1873-4, part 2, p. 1232.

⁴ Davis' International Law, pp. 102, 106.

native land was there seized and forced into the army. This was the case of Largomarsini.¹ As illustrating how powerful a factor public opinion may become in the formation of international law, it is to be observed that Secretary Fish referred to it in his correspondence with Minister George P. Marsh upon this topic, and said it could not be disregarded. And if the government occasionally failed in its efforts to protect, it was no longer because of any false notions about the right to protection.

Russia was another country that had not accepted the new theory. In 1882, one Reinhardt Wagner, a Polish designer living in Philadelphia, revisited his former home at Lodz, in Russian Poland, and while there was charged with evasion of military duty, and deprived of his passport. The Russian police, among whom if his story is to be believed, he had distributed five hundred roubles, failed to find him when the warrant was issued for his arrest, and he left the country on a borrowed passport. In these proceedings, as Secretary Frelinghuysen said, it was not easy to find good ground for diplomatic reclamation, but on the basis of this case he nevertheless instructed Minister Hunt that this government would never admit the claim of the local or general officers of a foreign government to decide that the bona fide holder of an American passport had no right to it. "Such a paper" said he, "is the highest evidence that the person to whom it was granted is a citizen of the United States, entitled by our own laws and by the generally accepted law of nations to the protection due at home or abroad to all citizens, whether native or naturalized, unless it can be shown that by their own acts they have voluntarily ceased to enjoy their right to such protection. That is a question to be decided between the two governments." He said also that the existing naturalization treaties with Great Britain, Germany and Austria abundantly demonstrated that the United States government was disposed to go to all proper limits in recognizing the jurisdictional claims of foreign states, but that no uniform Russian rule was observable; indeed the United States did not even yet know whether Russia still adhered "to the old and now elsewhere abandoned theory—'once a subject, always a subject'—or whether the claim was limited to cases where the parties may be at the time lying under some legal or military responsibility." It was a harsh rule that a subject who had left the country when called upon to serve in the army, and had become a citizen or subject of another state, might, if he returned to the former jurisdiction while yet of age for military duty, be compelled to serve out his term, but even this was a wholly different thing from asserting an absolute claim over one who had, like Wagner, left his native land four or five years before he became of age and incurred the liability for military service, and had already by residence in the United States for more than three years preceding his majority, acquired, under the laws, the preliminary rights of citizenship. "There would be no limit," said the Secretary, "to such a pretension; for the taking of a male

¹ Davis' International Law, p. 106.

infant out of Russia, might be regarded with equal propriety, as an 'evasion' of eventual military service."¹

It is a long step from Wheaton's curt statement that a man's nationality "reverts," to Frelinghuysen's criticism upon any rule that permits political obligations to survive translation from one nationality to another. But the civil war made it seem very contemptible for a government to allow any naturalized citizen who had fought for its preservation to be meddled with abroad. And whatever the perplexities of the question may be, it will not be wholly settled so long as the status of the naturalized citizen differs in any respect from that of the native. The state that does not want to protect its foreign-born citizen should not have let him be naturalized.

The United States, however, has itself to blame for the principal difficulties of this question. So long as its laws continue to tolerate the heedless and indiscriminate manufacture of citizens from the rawest material, it will deserve all that it may suffer in consequence. The most puzzling feature of the naturalization problem lies, no doubt, in the difficulty of discriminating between foreigners who have been naturalized in good faith but whose business interests recall them to their native land to remain indefinitely, and those whose sole purpose in naturalization is to enable them to hasten back, freed from the burden of enforced military service. Any such general rule as that the status of the naturalized citizen should be precisely like that of the native, will find its exception in the latter case, for fraud will violate any contract, and naturalization is a contract in its essentials. If it be said that during such foreign residence the citizenship acquired by naturalization will be kept alive by the intention of returning,—the *animus revertendi*,—the obvious answer is that indefinite prospective residence is hardly consistent with such an intent, and that even the sworn assertion of the intention is not sufficient proof of it. It is for the interest of both countries to determine whether or not this fraudulent intent exists, and it might properly be a question for some sort of international tribunal established by treaty. The proviso now contained in the treaties with Germany, Austria and Denmark, that a residence of more than two years establishes a presumption against the intention to return, fixes an arbitrary rule that is effective, but is as likely to work injustice as justice, and at once deprives the naturalized citizen of the right which the native has to reside abroad.

Detroit College of Law.

¹ House Ex. Doc. 88, 48th Cong., 1st Sess.

POLICY OF JAPAN TOWARDS PORTUGAL.

GINGIRO YOSHIMURA, LL. M.

Since the Japanese government withdrew the judicial powers of the Portugese consul in Japan, the foreign newspapers, i. e., the German, English, French, and those of many other civilized countries of the world, wrote concerning it, and most of them declared it to be an unlawful, irregular act. One of these journals said that "the decision of the Japanese government is a great error," and that no foreigner will give his agreement to this policy of the Japanese government. By this is meant not only those foreigners who have never been in Japan, but those who have been there once, and admire our country very much.

When I read this criticism it seemed to me quite strange and it gave me great concern to hear the reasons for the conclusions of these foreign writers. But these reasons seem to be founded upon error, since the papers did not publish the treaties which had been settled between Portugal and Japan about thirty-three years ago (First of Manen) for the mutual benefit of the two countries. However, I am not sure that my opinion is right. It seems to me as though they did not understand the articles of treaty, even though they may be well acquainted with our governmental system. I am also sure that had they known all these matters,—that is the organizations, usages, and habits of our country,—their opinion on this subject would not be so unfavorable, although they would not probably have entirely approved our decision. Perhaps these opinions of foreign writers have resulted because they cannot understand our motives. As our country stands independently, in a remote spot from the continent, we thought that we could not gain foreign confidence, and even when our judgment was in the right we thought they would not treat the question properly in their journals, for the foreigners would keep in mind their own powers, interests, policies, etc.

Although my opinion may not be entitled to much consideration, yet I believe that their conclusions are greatly at fault. We are apprehensive lest their views will become the general opinion, as the news-writers by reason of their positions, exercise a widespread influence. Thus it is that I wish to express the fundamental reasons for our judgment and I hope thereby to gain a favorable hearing.

It has already been said that these newspaper conclusions were founded upon a mistaken view of the treaty. Thus, before I shall discuss my opinion in detail, I shall give the articles of the treaty most important to this discussion.

Art. II., §2, says: By this treaty the Portuguese emperor shall appoint the diplomatic agent who shall reside in Yedo (now called Tokio) and the consul or consular agent who shall reside in one of the harbors which were opened for his trade.

Art. IV. says: The disputes which take place between Portuguese who are in Japan shall be decided by the Portuguese officer.

Art. V. says: A Japanese subject who commits any crime against a Portuguese shall be tried and punished by the Japanese officer according to the laws of Japan. A Portuguese subject who may be guilty of any criminal act towards a Japanese subject or other foreign subject, shall be tried and punished by the Portuguese consul or any other functionary authorized there, according to the laws and systems of Portugal.

Art. VI. says: A Portuguese subject, having reason to complain of a Japanese subject, must proceed to the consulate and state his grievance to the consul. The consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Japanese has reason to complain of a Portuguese subject, the consul shall no less listen to his complaint and endeavor to settle it faithfully. If disputes arise of such a nature that the consul can not arrange them in a friendly manner, then he shall request the assistance of the Japanese authorities, that they may together examine into the merits of the case, and decide it equitably.

Art. VII. says: Should any Portugesé subject fail to discharge debts incurred to a Japanese subject, or should fraudulently abscond, the Portuguese consul shall do his utmost to bring him to justice and to enforce recovery of the debts.

According to the above treaty no one will doubt that the leading condition to the judicial power is that the Portuguese government must send a consul or some other duly authorized officer who has the power of judgment to Japan where he shall reside. It will not be recognized in Japan if it does not appoint these functionaries. Also if the power was to be held by Portugal, she was not to allow any vacancy in this office, that is to say, have a consul in Japan one year, and perhaps none the next, unless special permission were given her to do this. In the meantime, however, Portugal had not appointed these officers, so just ten years ago, namely (15th of Meiji) our government desired to accredit a consul, or other officer, for Portugal. In consequence of this, Portugal sent a consul-general to Tokio, although this did not fulfil entirely the conditions of the treaty, for his functions were more limited and narrow than those of most other consuls.

Just six years ago (19th of Meiji) while our government was considering these inconvenient and unsuitable restrictions, an unfortunate event happened at Nagasaki. The consul-general could not arrange the matters that then came before him, by reason of these restrictions, so upon the proposition of the Japanese government, Portugal increased his functions. On the other hand, in 1892, she abolished the diplomatic office of consul-

general in our country, since to her mind this office cost too much although this seemed to us a very selfish and discourteous act. Giving expression to her injured feelings, our government unhesitatingly declared, a short time after, that Portugal had lost forever her consular jurisdiction in Japan and so long as a Portugese remained there, he must submit to be governed according to the laws of Japan. When we, "the people of our country", read this proclamation, we admitted it to be a lawful judgment and consented to it, as far as the treaty was concerned. For example, let us suppose that some trouble had arisen between a Portugese and a Japanese, or that a Portugese has committed a crime. While there was no decided authorized jurisdiction, how would the trouble be settled? Thus our government's declaration was indeed wisely and fittingly made, so that not only we, the people, consented, but also foreigners who were in Japan showed their concurrence.

According to my opinion, so far as the declaration of our government is concerned, Portugal cannot recover her standing in Japan, however much she may claim it, since she has given up her power by breaking the provisions of the treaty. Thus Portugal cannot have any powers unless a reasonable course be taken; that is, a new treaty made. Consequently it is very clear that when a Portugese subject commits any criminal or civil act he must submit to be punished by the laws of Japan.

When the Portugese received the report of our government, they seemed to have been much astonished and depended on France for aid, asserting to our government, that hereafter they would let French officers, that is the ambassador or consul, etc., decide all disputes concerning Portugese in Japan. This self-willed arrangement would not be accepted in Japan. The French government, however, had paid no attention to this request of Portugal, as it was not a matter which had originated by the courtesy of public intercourse. Her scheme having thus failed, Portugal, at last, had to report to our government and offered to send a consul again; but it is beyond doubt that our government will reject this offer, for Portugal has now no privilege to interfere with our authority. As the result of her very foolish conduct, unlike that of a civilized country, Portugal cannot gain any rights just at present.

As far as my knowledge extends, the countries should be equal in power, each having the same rights, no matter how great their respective population and wealth. We, the people of Japan, always regretted that we gave foreign countries ex-territoriality, and feel strongly that the present treaties should be revised. Surely the history of our great misfortune, concerning principally the judicial and tariff treaties, which has existed for many years, has aroused, in the people throughout Japan, the strongest desire for the revision of treaties. Thus this, the first step in the work of revision, is favored by all the people who desire that they may stand on an equal footing with other civilized nations, without any added condition or restraint.

To any foreign gentleman we say: Will you please look back on the Japan of years ago and then note the stability and progress of the Japan of to-day? For twenty years we have enjoyed incomparable progress in the world. Especially during the last ten years, we have made radical improvement in our judicial system. I believe that those foreigners who have studied our country already know about this system, but I shall discuss it in brief. The Japanese social habits, customs, literature and arts are almost wholly adapted to her own and no other needs, and by the progress of legal ideas she has very many judges and legal advocates on her bench familiar with the theories, maxims and decisions of western law. European law is taught in her universities, in the cities, and in many of the provincial places. Thousands of law students at the present time are graduating from the several colleges which teach western jurisprudence, with generally a three years' course. Besides, she has revised her codes, adopted the principles of western jurisprudence, and her customs and usages have thus been greatly changed and revised by our jurists. Since the constitution was granted, our judges have been appointed as it provides, by competitive examinations, and these candidates must be graduates of the colleges above mentioned. So far, since our judges have possessed more than average ability, we have had no anxiety about their judgment. Lately we heard that Americans who had suffered through the imperfection of consular courts declared that they would rather trust their cases in the hands of Japanese judges. Since we have such a complete and perfect judicial system, it seems to me that the Portugese need not be afraid of our methods of dealing out justice.

I would be much pleased to have every foreigner who reads the above treaty and the comments I have added, to be an equitable judge of my opinion. I hope that he will understand my purpose in writing this, and should be gratified if some of my readers come to the conclusion that Japan has acted wisely in this matter. If a new treaty is made by us with Portugal, may it be the first of those treaties, in which Japan will be recognized as an equal of the other countries.

MICHIGAN LAW JOURNAL.

SUBSCRIPTION PRICE, \$2.50 PER YEAR.

35 CENTS PER NUMBER.

RALPH STONE,
ELI R. SUTTON,

H. D. JEWELL,
U. F. BICKLEY.

OFFICIAL PUBLICATION MICHIGAN STATE BAR ASSOCIATION.

Published monthly, at the Department of Law, University of Michigan, Ann Arbor, Mich.
Entered at Ann Arbor postoffice as second-class matter.
Address all correspondence to MICHIGAN LAW JOURNAL, Grand Rapids, Mich.

THE first volume of the MICHIGAN LAW JOURNAL is completed with this number. Those who subscribed last February will receive the January number, the first of Volume II. An index to Volume I will be found in this issue.

DAVID DUDLEY FIELD, ESQ., the eminent New York lawyer and generally regarded as the father of the New York codes, has given his entire law library to the Washington and Lee University, located at Lexington, Virginia. The Cornell Law School recently acquired the magnificent law library of the late Alexander Moak, of New York, said to be the finest private law library in the state. We stand ready to record the gift of a library by a Michigan lawyer to *our* University law school. A library can be devoted to no more worthy purpose. Although the University law library compares favorably with any law school library in the country, yet additions of any size or kind will be welcomed by the large numbers of students who use it every year.

TWO DUCKS IN COURT.—A somewhat amusing example of the trivial matters with which courts of law sometimes have to deal, and how men sometimes over-reach themselves in their desire for spite, was given in a case before a Grand Rapids justice of the peace, a few days ago. Noah Tooley, who runs a milk wagon, had an account of nine or ten dollars against one of his customers, named Williams. Not getting his pay Tooley quit furnishing Williams with milk. Subsequently he agreed with the latter's wife to take two ducks, worth about fifty cents, in payment of the bill, and took the ducks home. Williams became incensed at that and got out a writ of replevin for the ducks, claiming that they were his and that his wife had no right to sell them. Mr. Tooley's attorney wanted to settle the case and offered to let Williams keep the ducks and cancel the milk bill if he would discontinue the suit and pay the costs he had made. This he refused to do and the case was called. Tooley's attorney then moved to dismiss the case on ground of mis-nomer, the defendant being

variously described in the writ as "Poole," "Tool" and "Toole," with no Christian name inserted in the writ at all. The court sustained the motion, and Williams was then obliged, not only to pay the costs, but to return the ducks, and still owes the milk bill.

AS IF there were not enough things about this earth to provoke litigation, meteors from other parts of the universe are coming here to swell the business of our courts. One fell and embedded itself in the land of an Iowa man last May. Another man dug it up and sold it. The owner of the land claimed the aerolite and the controversy finally went to the Iowa supreme court. (*Goodard v. Winchell*, Oct. 4.) That tribunal held that the stone belonged to the owner of the land where it fell, and that the one who dug it up was practically a trespasser. This seems to be the sensible view of the case. It was certainly placed upon the land by nature, and became the property of the owner thereof as clearly as any other stone on his land, the minerals in his soil, or the accretions from traversing rivers. What matters it that the manner of its acquisition was unusual?

THE committee on jurisprudence and law reform of the Michigan State Bar Association, of which Thomas J. O'Brien, Esq., of Grand Rapids, is chairman, has under discussion the various plans that have been suggested and advocated for the relief of the supreme court. A bill will be prepared and submitted to a special meeting of the Michigan State Bar Association called for the third Tuesday in January at Lansing. The bill, as modified or amended at that meeting, will be introduced into the legislature and urged upon the attention of the governor. In order that the bill may embody the best thought of the lawyers of the state, it is desirable that the members of the State Bar Association go to Lansing prepared to give the committee's bill an intelligent hearing. To that end, we will publish in the January number of this journal either the text of the bill or a full synopsis of its provisions.

CHURCH wars are usually spicy and sometimes bitter little conflicts. One of these unfortunate affairs gave rise to quite an interesting decision by the judge of the quarter sessions court of Dauphin county, Pa., in *Commonwealth v. Underkoffer*. The members of one rival faction of a certain religious denomination went to church early one morning and locked the doors. Shortly after, the members of the other faction began to assemble but were unable to gain admission. They did not propose to be locked out in that way, however, without protest. They secured a constable who broke in the doors and arrested the brethren on the inside for disturbing a religious meeting. But the aggressive faction scored another triumph in the courts, for the judge instructed the jury that it did not amount to the crime of disturbing a religious meeting to go into a church before the congregation assembled, lock the doors and prevent the members on arriving from gaining admission. The jury thereupon acquitted the defendants, but tried to even things up a little by making them pay the costs.

THE *Columbia Law Times*, published at the reconstructed Columbia College Law School, in its initial number of the new college year, complains about the abuses the students make of their privileges in the law library.

The matter has become so serious that it has been deemed necessary to circulate an agreement among the students, by which it is expected the evils will be corrected. The Columbia College Law School has abandoned the text-book system of teaching and adopted the "case" system. The consequence is, the law library is used by every student in the school, where before it was looked upon merely as a reference library and used only occasionally. There is now an increased demand for the same cases. The plan was adopted of giving out the cases a week in advance, but this did not entirely do away with the trouble. The practice has grown up of secreting the books, instead of placing them back upon the shelves, thus working injustice to the students who are unable to read the cases assigned to them. We are glad to be able to state that at the University of Michigan Law School, with its 660 students, three or four times as many as Columbia, where the temptation to secrete books is much greater, no such practice prevails, or if it does, only to a small degree.

GINGIRO YOSHIMURA, LL.M., who contributes an article to this number upon "Policy of Japan Towards Portugal," is one of that rapidly increasing class of Japanese young men who are coming to this country for a liberal legal education. Nine-tenths of these attend the law school of the University of Michigan. Mr. Yoshimura represents Japan at the World's Fair. He is a graduate of Keiogijiku in Japan, where English is taught in a five years course. He then entered the agricultural department of Imperial University of Japan, but abandoned that course of study in a year and a half and entered the English law institute attached to that university and graduated after pursuing a three years course. He became an officer of the Department of Communication of the Japanese government, but resigned to go to Ann Arbor. At the law school of the University he finished the regular two years' course and the post-graduate course. He has, therefore, a very thorough legal education. He is especially well qualified to write concerning the diplomatic affairs of his own government, to which he has given especial attention, and what he contributes to this number possesses particular interest.

WHEN the projectors of the Australian ballot law succeeded in securing its adoption in a majority of the large states of the Union, they undoubtedly congratulated themselves that they had done much for the purification of elections. They undoubtedly have been justified in their belief, but if they are induced to believe that they have made it impossible for the corrupt politician to bribe voters, they are deceiving themselves woefully. The past general election has made it painfully evident that something more than rendering secret the actual casting of the ballot is needed in order to remove every possibility of bribery. There must be more complete safeguards around the exercise of the franchise, if the shrewd political manager is to be outwitted. As was evidenced in several parts of the country at the recent presidential election, the ingenuity of the "practical politician" has invented a very simple plan to circumvent the Australian ballot law. We believe that the press of the country has either failed to notice it or has omitted, for reasons known only to itself, to mention it. The plan is simply to bribe voters to stay away from the polls. In some instances, voters are coralled in a secluded hall before the polls open and placed under guard until the polls close and then paid their money, the "practical politician" thus assuring himself that they

have not cast their votes. His opponents have lost so many votes, or his own party, in a negative sense, has secured that number of voters. It is needless to say that such methods are deserving only of the severest condemnation. The Australian ballot law cannot remedy the evil. Something else must be done, or the law is a failure.

LET US HAVE A CODE.—In our September number we said, that the legal profession was found slow to appreciate the advantages which the code will introduce. The historical conservatism of the legal profession has in many doubtful struggles preserved the liberties of the English race; but this same spirit of conservatism, instead of protecting, has sometimes threatened, the liberty of the people. Whether or not evolution is the order of the universe, no class of men know better than do lawyers, that there is, or should be, progress in law. In theory the common law is adequate for all the demands of a complex civilization, yet in fact its inadequacy is proved by the massive volumes of statutes, which are but awkward attempts to adapt the common law to the changed conditions, which society in its forward march has attained. If at every session the legislature is called upon to abrogate, or modify, provisions of the common law, felt to bear too heavily on individuals or society as a whole, why would it not be wise to remove at one sweep all hindrances so far as law is concerned to social progress, instead of taking away gradually provision after provision, that has become an unbearable burden? Some states have done this. New York, through the efforts of one of her ablest lawyers, David Dudley Field, set the example, and based upon the common law, has erected a code which, by almost common consent, has vastly facilitated the administration of justice, and which has been followed by every state of the Union, not fettered by the bonds of a long established system of common law.

The introduction of the code has always to contend against prejudice in favor of a pre-existing system, but its establishment is no sooner accomplished than its opponents become its warmest supporters. A parallel is seen when the question of a written constitution was submitted to the American people. The anti-federalists immediately after the adoption of the constitution, and their descendants to-day, make up the school of strict constructionists. They would under the constitution take nothing for granted, while before its adoption they were willing to take everything for granted. Experience in code states has shown, that the older lawyers, who by long practice have grown familiar with the common law method of procedure, and by constant study have acquired a sort of superstitious reverence for it, as the *summum bonum*, when a code is established against their opposition, become in time its most ardent supporters, and insist upon a strict construction of its provisions.

Any plan which will make the law more easily understood by those for whose protection it is most needed, ought surely to be welcome, especially as long as "*Ignorantia juris neminem excusat.*" Caligula was called a tyrant for hanging his proclamations where the people could not read. Rights and liabilities under the common law have been buried so deep by all these years of litigation, that they are more difficult to exhume by the average citizen, than were the proclamations of Caligula to decipher. These rights and liabilities become buried deeper and deeper, by an ever accumulating mass of precedents, flowing from the courts of forty-four sovereign states, the territories, and the federal judiciary, each acting after its own fashion. The code proposes to reduce this enormous

mass of disconnected and doubtful material to definite, written shape, incapable of misunderstanding, except so far, as the ambiguity of language may require. The law cannot cleanse itself; this must be done by extrinsic aid. Before the American Bar Association, in 1888, George Hoadley voiced the same thought when he said: "It (the common law) embalms errors as readily as truths, and enshrines its blunders as gods."

In many of the older works on the common law, the student is forewarned that a dreary way lies before him. The only way that lies before him leads towards the feudal ages, and to pursue that journey he must travel toward the past. The code tells him to about face and look forward. The disconnected mass of precedents only serves to bewilder his mind in the same way that the facts of science bewildered the student of nature before Linnaeus codified the laws of nature. If it be true that when "the reason fails, the law itself falls," the common law should in great part give way; yet the courts, while in some cases superstitiously clinging to maxims, in others they repudiate them if their enforcement would endanger in any way the common law itself. In *Bertles v. Numan*, 92 N. Y., 165, the court said: "There are many rules appertaining to the ownership of real property, originating in the feudal ages, for the existence of which the reason does not now exist . . . yet on that account courts are not authorized to disregard them. They must remain until the legislature abrogates or changes them." What an anomaly have we here! A court speaking judicially has defined the common law as made up partly of rules for which no reason now exists. Let then the legislature of Michigan imitate the example of the majority of the states of this Union and simplify, and tear away the excrescences, which for centuries have been accumulating on our system of laws. Without the aid of the bar of Michigan, however, this cannot be done; yet no bar is, or has ever been, more able to do this work, or will do it more efficiently and beneficially, if they can be persuaded to undertake it. What would remain of our old system of common law, when stripped of all unnecessary elements and reduced to simplest form, would no more resemble its original mass, than does a clean cut statue the mass of wildy but everlasting marble. In either case, the artist must have a skilled hand or his work will result in greater harm than good.

NOTES OF RECENT MICHIGAN DECISIONS.

CONDEMNATION PROCEEDINGS—EVIDENCE.—The two most important points decided in *Detroit v. Robinson*, (November 4, Grant, J.), which was a proceeding by the city to condemn a small piece of land used by respondents as vineyard, were: (1) Where the improvement, when made, will constitute one continuous street, to be rendered uniform in width thereby, the proceeding will not be defective because improvements upon two different street are to be made under one proceeding; it is not necessary that all the pieces of land to be taken should be contiguous. (2) In determining the value of a vineyard, the testimony of witnesses, who had no knowledge of grape culture and the value of grape vines, is not incompetent; but the weight to be given it is for the jury.

NEGLIGENCE—MASTER AND SERVANT.—Where a gang of men are required to range themselves in line along a train of moving cars and, acting as one man, lift from the ground and throw upon the car as it passed a heavy steel rail, and then run fast enough along the uneven ground to be able to have the next mail in position to throw on the car of the moving train at the proper time as it passed, the failure to notify a new and inexperienced man of the great hazard attending the work is negligence *per se*. In determining whether or not a servant is a superior servant, for whose acts the master is held liable, the question whether or not the servant has power to employ and discharge other servants is important. This seems to be the gist of an interesting decision by Durand, J., in *Palmer v. Michigan Central R. R. Co.* (October 27.)

SEDUCTION BY PROMISE OF MARRIAGE—INFANCY AS DEFENSE.—In: *Becker v. Mason* (Oct. 27, Grant, J.), which was an action for seduction, two defenses were interposed: (1) That the evidence did not make out a case of seduction, but that plaintiff yielded to his desires by the blunt offer of wedlock *in futuro* in exchange for sexual favors *in presenti*; (2) that the defendant was at the time an infant, and therefore could not be held liable on the ground of his broken promise to marry. Inasmuch as the evidence clearly showed that the plaintiff resisted defendant's solicitations for three months or more, the defense was a flimsy one indeed, and nothing more nor less than an effrontery to a court of justice. The court unhesitatingly held that it was a clear case of seduction, and not a mere barter and sale. The action not being for a breach of contract for marriage, but of tort, in which the promise of marriage was made the means of accomplishing the wrong, infancy could not be set up as a defense.

INJURY BY FELLOW-SERVANT.—The question presented to the court in *Enright v. Toledo, Ann Arbor and North Michigan Railway Co.*, (Nov. 4, Grant, J.) was whether a railroad company can be held responsible for injuries to one of its employes caused by another, where the latter violated

one of the rules of the company. Enright was killed in a collision. He was conductor of a freight train which was standing within the station limits at Ithaca. The second freight train was ordered by the train dispatcher to follow and to run through to a point beyond Ithaca. Rule 97 of the company prescribes that, "Freight trains will approach all stations under full control, expecting to find trains using main tracks within station limits." The second freight disregarded this rule, and crashed into the first freight, injuring Enright fatally. The neglect of the engineer of the second freight was the proximate cause of the collision. He and Enright were fellow servants, and the personal representative of the latter could not, therefore, recover from the railroad company.

BOND IN REPLEVIN.—*Hopkins & Son v. Green* (Nov. 4, Grant J.), furnishes an example of the ingenious attempts sometimes made to evade the spirit of the law. Plaintiffs commenced a suit in replevin in justice's court, and gave a bond executed by George W. Hopkins and son, as principal, and George W. Hopkins, as surety, the name of the son nowhere being given. This was held to be an irregular bond, as the statute requires security additional to the pecuniary responsibility of the plaintiffs, and one of several co-partners, plaintiffs, is no additional security.

The amount involved in this case was insignificant, the judgment for the plaintiff in the justice's court being only two dollars. The decision of the circuit court was clearly right and should have been final. An arrangement by which a large number of such frivolous matters could be kept out of the supreme court would go a long ways towards solving the question of its relief.

BILL TO REDEEM ALLOWED UNDER PRAYER FOR GENERAL RELIEF.—In a court of chancery, where redemption is one of the things sought, although the bill does not ask this specific relief, yet it will be considered sufficient as a bill to redeem, the prayer for general relief being treated as a prayer to be allowed to redeem. This was one of the points decided in *Drayton v. Chandler & Taylor*, (Nov. 4, Durand J.). Although this question is not often before the courts yet it seems a little singular that counsel should dispute it. It is the province of courts of equity to grant as full relief as possible under a general prayer, and so far as consistent with the rights of the defendant. It was said in England many years ago that, "where a mortgagee is made a party to a bill, praying relief is the same thing as praying to redeem, for redemption is the proper relief." *Chomley v. Countess Dowager*, 2 Atk., 267. The same principle has been directly adhered to in Michigan from the first. *Swarz v. Sears*, Walk. Ch., 170; *Flanders v. Chamberlain*, 24 Mich., 305.

POWERS OF A DEPUTY CITY CLERK.—In *Tower v. Welker*, (October 27, Durand, J.), the plaintiff contended that a renewal of mortgage was invalid because the affidavit was sworn to before a *deputy* city clerk, and not before the city clerk. The city charter (Ionia) gave the city clerk power "to administer oaths and take affidavits," and to appoint a deputy, who in the case of the absence, sickness, etc., of the clerk, "shall perform the duties of such clerk." The court said, "We, therefore, have no hesitation in saying that under these provisions the city clerk of Ionia had a right to appoint a deputy, who, upon the happening of either of the contingencies named, had the right to perform all the duties which the clerk

himself could legally perform." The duties of a deputy are co-extensive with the duties of a principal. "The act of the deputy in the present case was an official act, and hence as valid in all respects as though it were the act of the principal." *McRaven v. McGuire*, 9 Smede and Marshall's Rep., 34; *Abrams v. Erwin*, 9 Iowa, 87; *Commonwealth v. Arnold*, 3 Littell, 316; *Triplett v. Gill*, 7 J. J. Marshall, 438; *Hope v. Sawyer*, 14 Ill., 254; *Eastman v. Curtiss*, 4 Vt., 616; *Beaumont v. Yeatman*, 8 Hump., 542; *Parker v. Kett*, 1 Lord Raymond, 658; *Maloney v. Mahar*, 2 Doug., 432; *State v. Ruff*, 29 Pac. Rep., 999.

VALUE OF DOGS, HOW PROVEN.—Our esteemed friend, the *Albany Law Journal*, which confesses to take particular interest in laws concerning animals, and animal lore generally, will no doubt be particularly interested in the decision in *Bowers v. Horan*, (Nov. 4, Grant, J.) The plaintiff owned a shepherd dog which was valuable and useful to its owner in many ways. It had the bad habit of frequenting the yard of the defendant, however, against his wishes; was found in his hen-house one night (but one broken egg was the only damage visible); chased cats into his trees, and barked. One morning he saw the dog in front of his house and found that it had left some tracks on his freshly painted porch. This was a greater provocation than the defendant would stand, and he thereupon procured his gun and shot the dog. The court below instructed the jury that the defendant was not justified in killing the dog, and that the only question for them to determine was the value of the dog. This charge was held to be correct. It was also held that in determining the value of the dog, the testimony of farmers, who had seen the dog and knew what he could do, and who knew the value of such a dog to a farmer who kept stock, was competent; and it is not necessary that personal property must have a market value in order to render such opinions competent.

JURISDICTION OF THE SUPERIOR COURT OF GRAND RAPIDS.—The plaintiff, in *Burroughs v. Eastman et al.*, (November 4, Long, J.), was arrested by the defendants, the superintendent, captain and lieutenant of police of the city of Grand Rapids, for the reason that as manager he produced a play on Sunday evening in his theater in that city. He complained that "shortly after the play commenced, the defendants as such officers, entered upon the stage where the plaintiff was managing the business and then and there made an assault upon him, and beat and bruised, struck, wounded, maltreated, and arrested him, and against his will put a pair of hand-cuffs upon his wrists in the presence of the people in attendance there and pushed and dragged him through the opera house to the public street, and through such public streets to the police headquarters and detained and imprisoned him there for the space of one hour." The plaintiff brought suit against the officers in the circuit court, which held that it had no jurisdiction, but that the action should have been brought in the Superior Court of Grand Rapids. The act defining the jurisdiction of the superior court prescribes that it has exclusive jurisdiction of all actions against the "city or any of its officers." How. Stat., 6,576. Plaintiff contended that defendants were not "city officers," and the court said, "We are of the opinion that plaintiff's counsel is correct in his contention. The statute creating the superior court must be construed in reference to the provisions of the charter of the city of Grand Rapids and the police force act; and from an examination of the three acts it appears that policemen of the

city and the police officers named are not named in the charter and do not come within the designation of the superior court as city officers. They are not subject to removal under the provisions of the law for the removal of city officers. They are not elected or appointed under the provisions of the charter; but by authority vested in the board of police of the city." *Attorney General v. Cam.*, 84 Mich., 223. The court goes further and says that it is doubtful whether "the circuit court would have been ousted of jurisdiction had the offense been committed by a constable or other officer enumerated in the charter as an officer of said city."

A UNILATERAL CONTRACT.—The defendant signed a printed order of plaintiff for a wind-mill, and handed it to an agent of the plaintiff who forwarded it to his company. The order contained a clause providing that it was "not subject to countermand," and that "no verbal understanding of the agent could effect it." The plaintiff wrote the word "accepted" upon it together with the words "will ship to-day, May 28, 1890," signed it, and returned it to the defendant. Before receiving this the defendant wrote to plaintiff countermanding the order. The mill was shipped, however, and the defendant finally accepted it upon verbal warranty of the agent. The mill did not comply with the warranty, but plaintiff claimed that agent had no authority, under the written order, to make a warranty. The court, (Long, J., October 27, *Challenge Wind and Feed Mill Co. v. Kerr*), however, said, "The written order given by the defendant to the agent was countermanded before acceptance by the plaintiff and before the plaintiff had taken any steps whatever toward filling the order. The defendant had a right during that time to countermand it. The order was one which the plaintiff could accept or not as he pleased. This right was expressly reserved in the order, and until acceptance the contract was unilateral," and the defendant not bound. *Wilcox v. Cline*, 70 Mich., 517.

LIABILITY OF PROPRIETORS OF RESORTS FOR INJURIES TO THEIR PATRONS.—Is the proprietor of a summer resort liable to his patrons for injuries received from attractions, such as "switch-back railways," "merry-go-rounds," etc., allowed on his grounds? This was the interesting question before the supreme court in *Knotternius v. The North Park Street Railway Co.*, (October 27.) Defendant owned and operated a pleasure resort, known as North Park and a street railway running to it. Within the park was a switch-back or roller coaster, owned and operated by one Hathaway. Plaintiff had taken one of defendant's cars to the park, and there, while riding upon the switch-back, was injured by the derailing of the car. Defendant had published in the local press a description of its resort, stating among other things that a switch-back railway was being built on its grounds. This plaintiff insists must be construed as an invitation to plaintiff to visit the resort, and to avail herself of the attractions, including the switch-back, and having invited her upon its premises, it was under obligations to be reasonably sure that it was not inviting her into danger. The trial judge refused to entertain this view and directed a verdict for the defendant. In affirming this decision McGrath, C. J., says in part: "A roller coaster is not a snare or an explosive. It is in and of itself notice of its character and purpose. Its presence and operation involves no danger to those who keep away from it, nor does its enjoyment necessarily involve injury. It cannot be said, that by granting per-

mission to operate a switch-back at North Park, defendant was guilty of negligence, nor that it was defendant's duty to guard it or exclude the public from its use. It is not unusual at places of resort to lease to others certain privileges, viz.: To operate swings, merry-go-rounds or roller-coasters, or to sell refreshments. The proprietors of the resort do not thereby become insurers against accidents to persons patronizing the lessee, or become liable for his carelessness. It is not uncommon for street railways, steamboats and railways to advertise attractions on their routes. They do not thereby become insurers of the persons while in attendance upon the attraction, or responsible for the carelessness of the operators."

The plaintiff's counsel relied principally upon *Conrad v. Clauve*, 93 Ind., 476, 47, Am. Rep. 388, but the court drew a very clear distinction between that case and the one at bar.

SUMMONS, ISSUED IN CALIFORNIA AND SERVED IN MICHIGAN, INVALID.—In *Howard, Administratrix, v. Coon*, (November 4, Durand, J.), judgment was obtained in California against defendant, a resident of Michigan, summons being issued by a justice of the peace in California, and served by the sheriff of Wayne county, Michigan. Durand, J. says, "A justice of the peace in California cannot acquire personal jurisdiction over a defendant, so as to be able to render a personal judgment against him of a character to be considered valid and enforceable as such in this state, when it appears that his only right for assuming such jurisdiction grows out of and is based upon a service of the summons issued in the state of California and served upon the defendant in the state of Michigan." Justice Cooley in *McEwan v. Zimmer*, 38 Mich. 765, said, "The service of process is for the purpose of notifying the defendant and giving him a fair opportunity to defend. But the service of process in Michigan, which requires one to appear and answer to a demand in a foreign country, would in general be of no value whatever, because a defense abroad would either be practically impossible or so expensive as to exceed the importance of the demand. It may therefore justly and emphatically be declared that such service would give no fair opportunity to defend, and consequently could not accomplish the purpose of process." *Bissell v. Briggs*, 9 Mass. 462; *Thompson v. Whitman*, 18 Wallace 457; *Kane v. Cook*, 8 Cal. 449.

VALIDITY OF TRIAL BY JURY OF LESS THAN TWELVE.—The constitution of this state, Art. IV, §46, provides, "The legislature may authorize a trial by a jury of a less number than twelve men." In 1861 the legislature passed an act, one of the provisions of which was: "That after the impaneling of a jury for any purpose, if, from death, sickness or any other cause, any of said jurors shall be unable to attend, the court in which said jury is impaneled may enter that fact upon their journal, or docket, setting forth the cause of such inability, and said cause or other proceedings shall then proceed in the same manner and with the same effect as if the whole panel were present; Provided, the number of jurors so absent shall not be greater than three in a jury of twelve, or two in a jury of six, and this act shall not apply to the trial of criminal cases in courts of record." (Pub. Acts 1861, p. 233; 2 H. S., §7622.) The constitutionality of this act was the question before the court in *McRae et al., v. G. R., L. & D. R. R. Co.*, (Nov. 4). The case was tried in the Wayne circuit court, and the trial lasted four months or more. A few days before the conclusion of the trial

one of the jurors, who had been quite ill for several days, was discharged by order of the court, against the protest of defendant's counsel, and the trial directed to proceed with the eleven remaining jurors. Error was assigned to this ruling, defendant's counsel insisting that this amounted to a mistrial. This brought the constitutionality of the act of 1861 directly in question, for if that act were valid there would be no room for the defendant's contention that the discharging of the one juror amounted to a mistrial. Long, J., in rendering the opinion of the majority of the court, held the act unconstitutional, as being in contravention of Art. VI, §27, of the constitution, which provides: "The right of trial by jury shall remain, etc." By this, he holds, is meant the right as it existed at common law, which was a trial by a jury of twelve good men and true, whose determination must be unanimous upon the rights of the parties, and unless this number was impaneled and sworn to try the cause, it would be a mistrial within the provisions of the act. He further holds that by the act of 1861 the legislature has attempted, without reducing the number to be impaneled to try the cause, to give the trial court under certain circumstances the power to fix and determine the number that may try the cause. Granting that the legislature has the power to fix and determine the number at less than twelve, it has not done so by this act, but has attempted to confer upon the trial courts the power to do so. Under the constitution this power was not one which the legislature might delegate to any court or other tribunal. The act was therefore unconstitutional and void.

From this view Montgomery, J., dissents, and writes a dissenting opinion, in which McGrath, C. J., concurs. He maintains that if the legislature may authorize a trial by a jury of less than twelve men, it may provide in what contingency the trial may proceed before a jury composed of a less number than twelve men; and that that was the extent to which the act in question went. After referring to the practice of discharging the thirteenth juror, where more than the requisite number have been drawn, he concludes: "The objection that the statute in question destroys the unanimity of the verdict would apply with equal force to a case where the thirteenth juror is excused under the common law practice. The verdict of the jury, as it is composed, upon the happening of the contingency which excuses one or more, must of course be unanimous. The question is, whether the jury when it takes the case for deliberation and determination may consist of less than twelve. This the legislature has provided in certain contingencies, and I think the act making the provision is valid. The Michigan cases referred to in which it is said that our constitution in retaining the right to trial by jury tacitly refers to and adopts the common law number, have no application to the case under consideration. They would be just as decisive authority for holding that the legislature could not in terms limit the number of jurors to ten in all cases, as for holding that they could not do so upon the happening of a contingency, and yet the clearest authority for this exists in the constitutional provision above quoted, and I can discover in no decision of this court anything indicating a doubt as to the authority of the legislature to provide that a jury may consist of less than twelve."

BOOK REVIEWS.

THE AMERICAN DIGEST, ANNUAL, 1892.—St. Paul: West Publishing Company.

This digest for 1892 is considerably larger than the edition of 1891. In these days of numberless reports, a digest that will enable the busy lawyer to turn to the latest cases in point with the least possible waste of time, is more valuable at times than a skilled assistant. The annual for 1892, as prepared and edited by the editorial staff of the national reporter system, being Volume VI of the United States digest third series annuals, is a digest of all the decisions of the United States supreme, circuit and district courts, the courts of last resort of all the states and territories, and the intermediate courts of New York, Pennsylvania, Ohio, Illinois, Indiana, Missouri, and Colorado, U. S. court of claims, supreme court of the District of Columbia, as reported in the national reporter system and elsewhere, from September 1, 1891, to August 31, 1892. It contains in addition to this very comprehensive digest, votes of English and Canadian cases, memoranda of statutes, annotations in legal periodicals, a table of the cases digested, over-ruled, criticised, followed, and distinguished, during the year. The mechanical features of the book have apparently been attended to with nice discrimination. So many alleged digests, nowadays, consist solely of a mass of cases and matter thrown recklessly together without method, and it is such digests that prejudice the lawyer against digests generally. But this publication of the West Publishing Company, like all of their work, is produced by those who appreciate what the profession wants, and it is done carefully, methodically, and with rare good taste in selection, classification, and arrangement. One of the most valuable privileges attached to possession of this work is that of ordering from the publishers a full printed report of any case referred to in the annuals for 1887 and 1888, at an instant's notice, for a nominal fee. The most remarkable feature of the American Digest is its price. Only \$8.00.

There are 20,000 cases reported in this digest, and it was issued from the press within sixty days after the first publication of the last cases cited, a significant commentary not only upon the ability of the editorial staff, but upon the speed and dispatch of the mechanical department of the company. The publishers claim for it, the largest law book ever published. However this may be, we have no hesitation in pronouncing it the most complete publication of its kind that has ever come to us for examination.

R. S.

MODERN EQUITY JURISPRUDENCE.—Charles Fisk Beach, Jr. New York: Baker, Voorhis & Company.

The title of this work strikes one at first as rather novel. But when it is considered that equity jurisprudence is a development only, originating in the ancient high court of chancery, the use of the word "modern," in the title to Mr. Beach's work, is not inconsistent. From its very nature

equity must change with the changing conditions of civilization. It must adapt itself to modern ideas of right and wrong. The rules of equity are pliant. New equitable rights are springing up, with the advance of moral ideas. Changed social relations find prompt reflection in equitable legislation. If there is any one characteristic peculiar to equity, it is its capacity to mould itself to modern ideas of justice. It is simply, purely, and essentially, a growth. The refined and progressive doctrines of the separate use of a married woman, the restraint on alienation, the rule against perpetuities and the rules of equitable waste, were unknown when the high court of chancery was established. They grew up because civilization demanded them.

It is our opinion that Mr. Beach's commentaries on modern equity jurisprudence, as administered in the state and federal courts of this country, is a work which is indispensable to the attorney who practices in equity courts. We have no hesitation in saying that it is the finest law publication, in every respect, that has been placed before us for our examination this year. It is complete. This is evidenced by the thoroughness and particularity with which the author has treated such a subject as "injunctions to restrain infringement of patents, copy-rights, and trade-marks." It is practical. The practicing lawyer can find abundant case law in the two hundred and eight solid pages of cases cited. The index is comprehensive, and the table of contents so logically arranged as to facilitate the work of the busy lawyer in search of a statement of law. What commend the treatise, however, to the practitioner and the student as well, are the indications upon every page that it is a work of to-day. It is builded along modern lines.

Because of the multitude of almost worthless text-books that are thrown upon the market nowadays, we take especial pleasure in commending Mr. Beach's new work to the profession. The mechanical work upon the books (there are two volumes) reflects credit upon the well known New York publishers, Baker, Voorhis & Co.

R. S.

DIRECTORY OF SOCIETIES AND CLUB COURTS.

WEBSTER SOCIETY.

Wednesday evening at 7:30 in the Webster Hall.
President, U. F. Bickley.
Vice-President, J. S. Phillips.
Secretary, F. G. Jones.
Treasurer, J. A. Bordeaux.
Critic, I. B. Lipson.
Marshal, Chas. K. Friedman.

ERSKINE EXTEMPORANEOUS DEBATING CLUB.

Mondays 9 a. m.
President, U. F. Bickley.
Secretary, H. D. Billings.
Treasurer, L. L. Axford.

BENTON DEBATING CLUB.

Thursday afternoon, 3:30.
President, A. A. Kaiser.
Vice-President, F. B. Scanlon.
Secretary, P. V. Fennelly.
Treasurer, E. T. Waddle.
Marshal, A. McIntyre.

LINCOLN DEBATING CLUB.

Tuesday afternoon 3:30.
President, A. McIntyre.
Secretary, E. T. Waddle.
Marshal, A. A. Kaiser.

ONE YEAR MEN'S CLUB.

President, J. O. Hadley.
Secretary, J. A. Booney.
Treasurer, D. O. Grover.

OHIO CLUB COURT.

Tuesday evening at 7 o'clock.
Judge, Prof. Johnson.
Clerk, B. F. Brough.
Sheriff, G. W. Belknap.

INDIANA CLUB COURT.

Saturday mornings 8 o'clock.
Judge, W. O. Fitzer.
Clerk, F. W. Beal.
Sheriff, J. A. Tittsworth.
Prosecuting Attorney, W. Tichenor.

KEYSTONE CLUB COURT.

Chief Justice, B. F. Scanlon.
Associate Justice, H. L. Hegner.
Clerk, G. O. Stewart.
Prosecuting Attorney, H. L. Williams.

JEFFERSONIAN SOCIETY.

Thursday evening at 7:30 in the Jeffersonian Hall
President, E. L. Johnson.
Vice-President, E. L. Cunningham.
Recording Secretary, R. T. Webb.
Corresponding Secretary, W. H. Evans.
Critic, Grum Clay.
Treasurer, J. W. Lamar.
Marshal, A. G. Turnipseed.

MICHIGAN CLUB COURT.

Monday evenings at 7:30.
Circuit Judge, G. H. Albers.
Associate Judge, G. A. Dentier.
Clerk, J. E. Richardson.
Prosecuting Attorney, D. R. Willis.
Sheriff, D. O. True.

CONKLY DEBATING CLUB.

Friday afternoons at 3:30.
Offices Rotary, except secretary.
Secretary, L. W. Jefferson.

HOOBIE DEBATING SOCIETY.

President, H. D. Billings.
Vice-President, S. B. Roe.
Secretary, J. A. Tittsworth.

MISSOURI CLUB COURT.

Monday evenings at 7:30.
Judge, J. G. Park.
Clerk, E. L. Motley.
Sheriff, E. Spalding.

SOUTHERN CLUB COURT.

Chief Justice, E. L. Cunningham.
Associate Justice, J. Y. Rice.
Clerk, Norman B. Morrell.
Sheriff, Milton Johnson.

IOWA CLUB COURT.

Chief Justice, U. S. Sykes.
Associate Justice, E. H. Bither.
Sheriff, S. E. McMahon.
Clerk, O. E. Herminghausen.

WASHINGTON CLUB COURT.

Judge, P. M. Troy.
Associate Judge, A. W. Deming.
Sheriff, W. E. McReynolds.
Clerk, C. M. Dial.

INDEX.

ARTICLES.

	PAGE
Accidental Fires, Communication of. <i>McNally v. Colwell</i>	162
Address to the Alumni of the Law Department. <i>Benjamin Butlerworth</i>	189
American Mutuum, The. <i>Jerome C. Knowlton</i>	341
Annual Meeting, Michigan State Bar Association.....	225
Appointing Electors, Power of, Original or Delegated. <i>B. M. Cutcheon</i>	100
Appointment of Presidential Electors. <i>McPherson v. Blacker</i>	206
Attachment Before Debt Due. <i>Pierce v. Johnson. Note</i>	364
Capital Punishment. <i>J. W. Turner</i>	290
Circuit Courts, Michigan, Reform of. <i>Robert E. Bunker</i>	307
Circuit Courts, Reform of Michigan. <i>E. D. Kinne</i>	381
“ “ “ “ “ <i>Joseph B. Moore</i>	385
“ “ “ “ “ <i>Rollin H. Person</i>	386
“ “ “ “ “ <i>John W. Stone</i>	387
“ “ “ “ “ <i>Fred H. Aldrich</i>	382
“ “ “ “ “ <i>George P. Cobb</i>	384
Code of Civil Procedure, Leading Features of. <i>Samuel Maxwell</i>	279
Common Carriers, Limiting Liability of, in Transporting Goods and Live Stock. <i>A. H. Horton</i>	119
Communication of Accidental Fires. <i>McNally v. Colwell</i>	162
Conscientious Lawyer, The. <i>Jerome C. Knowlton</i>	199
Constitutional, Protective Tariff. <i>Edward Cahill</i>	348
Corporation Cases in 139 U. S., Three. <i>Alfred Russell</i>	17
Detroit Transportation Co. v. Board of Assessors of Detroit, Residence of Cor- porations for Taxation Purposes. <i>J. C. Knowlton. Note</i>	124
Education, Legal, Embarrassments to. <i>J. C. Knowlton</i>	12
Electors, Appointing, Power of, Original or Delegated. <i>B. M. Cutcheon</i>	100
“ Appointment of Presidential. <i>McPherson v. Blacker</i>	206
“ Presidential, How May Be Appointed. <i>B. M. Thompson</i>	48
“ “ “ “ Not Be Appointed. <i>Moses Taggart</i>	53
“ “ “ “ Methods of Appointing. <i>Thomas M. Cooley</i>	1
Embarrassments to Legal Education. <i>J. C. Knowlton</i>	12
Forgery by Erasure. <i>Marshall D. Ewell</i>	130
Franchises, Water Works'. <i>Charles E. Temple</i>	310
Grand Rapids School Furniture Co. v. Haney School Furniture Co., Right to Enjoin Publication of Libel. <i>Note</i>	314
How May Presidential Electors be Appointed. <i>B. M. Thompson</i>	48
How Presidential Electors May Not Be Appointed. <i>Moses Taggart</i>	53
Ink, Writing, and Its Identification on Written Documents. <i>M. D. Ewell</i>	21
Inter-State Extradition, A Suggestion Concerning the Law of. <i>Edwin F. Conely</i>	149
Japan, Policy of, Towards Portugal. <i>Gingiro Yoshimura</i>	402
Law Reports, The. <i>Nathan Abbott</i>	93
Legal Education, Embarrassments to. <i>J. C. Knowlton</i>	12
Leading Features of the Code of Civil Procedure. <i>Samuel Maxwell</i>	279
Libel, Right to Enjoin Publication of, Grand Rapids School Furniture Co. v. Haney School Furniture Co.....	314
Lien, Mechanics. <i>Albert H. Horton</i>	284
Limiting Liability of Common Carriers in Transporting Goods and Live Stock. <i>Albert H. Horton</i>	119
Mechanic's Lien. <i>Albert H. Horton</i>	284
Methods of Appointing Presidential Electors. <i>Thomas M. Cooley</i>	1
“ “ Presidential Voting. <i>B. M. Cutcheon</i>	8
Michigan State Bar Association, Annual Meeting of.....	225
Mutuum, The American. <i>Jerome C. Knowlton</i>	341

ARTICLES—Continued.

	PAGE
National Life, Sentiment in Our. <i>Grover Cleveland</i>	41
Naturalized Citizens, Protection of. <i>Henry A. Chaney</i>	389
Policy of Japan Towards Portugal. <i>Gingiro Yoshimura</i>	402
Power of Appointing Electors, Original or Delegated. <i>Byron M. Cutcheon</i>	100
Presidential Electors, Methods of Appointing. <i>Thomas M. Cooley</i>	1
Presidential Voting Methods. <i>Byron M. Cutcheon</i>	8
" Electors, How May Be Appointed. <i>B. M. Thompson</i>	48
" " " Not be Appointed. <i>Moses Taggart</i>	53
Promises To Pay, Testamentary. <i>Nathan Abbott</i>	154
Protective Tariff, Constitutional. <i>Edward Cahill</i>	348
" " Unconstitutional. <i>Thos. E. Barkworth</i>	357
Protection of Naturalized Citizens. <i>Henry A. Chaney</i>	389
Punishment, Capital. <i>Jerome W. Turner</i>	290
Reform of Michigan Circuit Courts. <i>Robert E. Bunker</i>	307
" " " " " <i>E. D. Kinne</i>	381
" " " " " <i>Joseph B. Moore</i>	385
" " " " " <i>Rollin B. Person</i>	386
" " " " " <i>John W. Son</i>	387
" " " " " <i>Fred H. Aldrich</i>	382
" " " " " <i>George P. Cobb</i>	384
Reports, The Law. <i>Nathan Abbot</i>	93
Residence of Corporations for Taxation Purposes. <i>Detroit Trans. Co. v. Board of Assessors of Detroit. Jerome C. Knowlton. Note</i>	124
Sentiment in Our National Life. <i>Grover Cleveland</i>	41
Sovereignty in the United States. <i>Thomas M. Cooley</i>	81
Suggestion Concerning the Law of Inter-State Extradition. <i>Edwin F. Conely</i>	149
Tariff, Protection, Constitutional. <i>Edward Cahill</i>	348
" " Unconstitutional. <i>Thos. E. Barkworth</i>	357
Testamentary Promises to Pay. <i>Nathan Abbott</i>	154
Three Corporation Cases in 139 U. S. <i>Alfred Russell</i>	17
Unconstitutional, Protective Tariff. <i>Thomas E. Barkworth</i>	357
Water Works' Franchises. <i>Charles E. Temple</i>	310
Writing Ink, and its Identification on Written Documents. <i>M. D. Ewell</i>	21

CONTRIBUTORS.

Abbott, Nathan	29, 93, 154
Aldrich, Fred H.	382
Barkworth, Thomas E.	357
Bunker, Robert E.	307
Butterworth, Benjamin.	189
Cahill, Edward	348
Chaney, Henry A.	389
Cleveland, Grover	41
Cobb, George P.	384
Conely, Edwin F.	149
Cooley, Thomas M.	1, 81
Cutcheon, Byron M.	8, 100
Ewell, Marshall D.	21, 130
Hatch, Reuben	331
Horton, Albert H.	119, 284
Kinne, E. D.	381
Knowlton, Jerome C.	12, 124, 199, 341
Maxwell, Samuel	279
Moore, Joseph B.	385
Pendleton, Edw'd W.	374
Person, Rollin H.	386

CONTRIBUTORS.—*Continued.*

	PAGE
Russell, Alfred.....	17
Stone, John W.....	387
Stuart, William J.....	332
Taggart, Moses.....	53
Temple, Charles E.....	310
Thompson, Bradley M.....	48
Turner, Jerome W.....	290
Webber, William L.....	331
White, George H.....	333
Yoshimura, Gingiro.....	402

MISCELLANEOUS.

Counselman Case, The.....	66
Directory of Club Courts and Societies.....	40, 80, 148, 188, 419
Draper, Charles S. <i>William L. Webber</i>	331
Eggleston, Ebenezer S. <i>Reuben Hatch</i>	331
Lecture Notes. <i>Nathan Abbott</i>	29
Michigan State Bar Association.....	335
Obituary.....	331
Our Exchanges.....	300
Parish, Isaac H. <i>George H. White</i>	333
Theses, Class of '92, Law.....	182
Ward, Leonard A. <i>William J. Stuart</i>	332

BOOK REVIEWS.

American Digest.....	38
Anderson's Dictionary of Law.....	38
Beach's American Probate Reports.....	379
Beach on Modern Equity Jurisprudence.....	418
Bell's Supreme Courts of the States.....	146
Black's Dictionary of Law.....	38
Carney's Secretary's Manual.....	186
Chase's Leading Cases on Torts.....	37
Chaplin on Wills.....	379
Cook's Stock and Stockholders.....	339
Crosby and Bell's Electric Railway.....	339
Dropsie's Roman Law of Testaments Codicils and Gifts.....	186
Dunlap's Abridgment of Elementary Law.....	79
Hawley's Law of Arrest.....	379
Hinsdale's American Government.....	147
Hopkins, Mark, Religious Leaders.....	78
Hopkin's Supreme Court Rules.....	305
Keasbey's Electric Wires.....	305
Lawson's Leading Cases Simplified.....	37
Lewis' Federal Power over Commerce.....	146
Matteson's Township's Clerks Manual.....	305
Meyer's Vested Rights.....	37
Patterson's Contracts in Restraint of Trade.....	147
Vance's Jurisdiction.....	186
Vermont, American Commonwealth Series.....	78
Walsh's Student's Quiz Book.....	188
Wambaugh's Study of Cases.....	79

EDITORIALS.

	PAGE
Admission to the Bar, Requirements for.....	372
American Bar Association, Annual Meeting of.....	265
Australian Ballot, Abuses of.....	408
Bigamy for Twenty Three Minutes.....	26
Carriers Limiting their Liability.....	169
Champerty, What Constitutes.....	325
Chipman, Samuel S., Death of.....	133
Church Wars.....	407
Code of Civil Procedure.....	295
Code, Let us have a.....	409
Credit to Students, a Penal Offense.....	217
Dower in Mineral Lands.....	265
Education, Legal.....	324
Electric Light Decision.....	293
Electric Railway Litigation.....	63, 323
Examination for Admission to the Bar.....	168
Gerrymander, The.....	328, 371
Gifts of Law Libraries.....	406
Good Will, Definition of.....	295
Hooker, Hon. Frank A.,.....	322
Law School, Year of 1892-93.....	320
Library Abuses by Students.....	407
Local Bar Associations.....	61
Mechem, Prof. Floyd R.....	374
Membership of the State Bar Association.....	294, 324
Mercantile Agencies, Responsibility of.....	323
Meteor Litigation.....	407
Michigan State Bar Association, Annual Meeting of.....	168, 268
"Miner" Electoral Law.....	26, 133
Moot Courts in England.....	105
Murder, Definition of.....	217
Notaries Public, Lawyers as,.....	266
Original Sources of the Federal Constitution.....	105
Patent Medicine Guarantees.....	369
Practice Court at the Law School.....	368
Printed Lectures, Sold for Profit.....	27
Reading the Law.....	27
Relief of Supreme Court.....	407
Reparation for Judicial Errors.....	293, 371
Residence of Corporations for Taxation Purposes.....	132
Resignation of Marshall D. Ewell, M. D.....	266, 326
Salutatory.....	25
Stealing Electricity.....	264
Tariff, Protective, Constitutionality of.....	327, 369, 370
Telephone Company's Extravagant Rates.....	62
Treating Jurors.....	104, 218
Two Ducks in Court.....	406
University Law School, Not a thing of the Dead Past.....	293
Unprofessional Language in Trials.....	133
Washington's Birthday Celebration.....	61
Will Cases, Frequency of Contested.....	26
Will made in Foreign Country, Validity of.....	324
Yoshimura, Gingiro.....	408

RECENT MICHIGAN DECISIONS.

- ABANDONMENT,**
 Of contract, rights of parties on, 113.
 Of contract, what constitutes, 140.
 Of claim, what acts not construed as, 118.
- ACCEPTANCE,**
 Of goods, when and how shown, 30.
- ACCOUNT STATED,**
 Evidence to prove, 223.
- ACCOUNTING,**
 Bill for, against trustee under will, 145.
- ADMINISTRATOR,**
 Bonds of, effect of recovery upon general, upon special, 273.
 Right to bring action for injuries on highways, 72.
 Right to compromise suit, 175.
- ADVANCEMENTS,**
 Evidence admissible to show, 177.
- ADVERSE POSSESSION,**
 Title by, 33, 69, 273, 336.
- AGENCY,**
 Acts by agent, inconsistent, 273.
 Agent with interest, when sale to principal invalid, 180.
 Liability of agent for fraud of principal, 223.
 Personal liability of agent, 70.
 Private instructions limiting authority of agent, 74.
 When notice to agent binds principal, 223.
 When ratification by principal implied, 270.
- ALIMONY,**
 Remanding of trial for refusing, 271.
- ALLEYS,**
 Liability of city for injury in, 70.
- ALTERATION,**
 Fraudulent, of contract, where parol evidence admissible to show, 274.
- ALTERNATIVE SENTENCE,**
 Validity of, 77.
- ANTE-NUPTIAL AGREEMENTS,**
 (See Dower).
- ARSON,**
 Conviction of, under statute, 298.
- ASSAULT,**
 With intent to do great bodily harm, what constitutes, 178, 270.
- ASSAULT AND BATTERY,**
 Conviction for, under information charging higher crime, 112.
 Evidence admissible in actions for, 144.
 When exemplary damages for, and how determined, 272.
- ASSIGNEE,**
 Of leasehold interest, agreements binding on, 114.
- ASSUMPSIT,**
 Claim for foreclosing mortgage, 174.
 Proof of settlement as defense, 142.
 Verbal promise to pay debt of another, 31.
 When evidence of payment question for jury, 67.
- ATTORNEY AND CLIENT,**
 Agreements between, 72.
- ATTORNEYS,**
 Agreements by, duty of trial courts in regard thereto, 111.
 Arguments by, when language used ground for new trial, 143.
- BAILMENT,**
 Violation of a contract of, action for, how brought, 298
- BAWDY HOUSE,**
 What constitutes keeping, 107.
- BENEFICIARY,**
 When may be changed by will contrary to by-laws, 42.
- BIGAMY,**
 Competency of evidence of first wife, 377.
- BILL OF EQUITY,**
 Dismissed when adequate remedy at law, 176.
 To deliver note and mortgage for cancellation, 108.

RECENT MICHIGAN DECISIONS—*Continued.*

- BILL OF PARTICULARS,
 - Refusal to furnish, effect of, 275.
 - When application far more specific to be made, 110.
- BILL OF SALE,
 - Admissibility of oral agreement to vary terms of, 69.
- BOARD OF POLICE.
 - In dismissal of officer, right to try question of commission of felony, 144.
- BOUNDARY LINES,
 - Between town lots, 111.
- BUILDING CONTRACTS,
 - Termination of, by notice according to agreement, 68.
- CARNAL KNOWLEDGE,
 - Of female child, information for, 270.
- CARRIERS,
 - Liability of special, 74.
 - Of Passengers, when liability ceases, 178.
- CASHER,
 - When assignment to, construed as to bank, 273.
- CERTIORARI,
 - When dismissed for irregularities, 271.
- CHANCERY,
 - When witnesses may be examined in open court, 75.
- CHANGE OF VENUE,
 - Right of state to secure against wishes of respondent, 337.
- CHATTEL MORTGAGE,
 - Amount payable to redeem from, 179.
 - Effect of notice of, 74, 223.
 - Mortgagee's right to compel prior mortgagee to make preferential assignment, 111.
 - Transactions construed as, 74.
 - What best evidence of filing, 142.
- COMMON COUNCIL,
 - Right to files and papers while investigating police judge, 76.
 - Right to reject contract, 141.
- CONDEMNATION PROCEEDINGS,
 - Improvements on two different streets under one, 411.
 - When award of jury in, set aside, 272.
 - When street may be opened and land taken by, 273.
- CONSIDERATION,
 - Inadequate, when grounds for setting aside conveyance, 30.
- CONTRACT,
 - Between partners, construction of, 71.
 - Construction of terms, 67.
 - Rights of parties on abandonment of, 113.
 - Unilateral, what constitutes, 414.
 - With cities, right of Common Council to reject, 141.
- CONTRIBUTION,
 - Right of co-tenant to demand, in foreclosure, 145.
- CONVEYANCE,
 - Between husband and wife, validity of, 69, 176.
 - For support, how construed, 144, 271.
 - For support, when court will annul, 271.
 - Setting aside, on ground of undue influence, 223.
 - Setting aside, when consideration inadequate, 30.
- CORPORATIONS,
 - Insolvent, directors of, as trustees for creditors, 109.
 - Power to extend corporate existence, 110.
 - Right to give preference by mortgage when insolvent, 109.
 - When plea of *ultra vires* can not be set up, 114, 143.
- CRIMINAL CONVERSATION,
 - Admissibility of wife's testimony in action for, 174.
- CRIMINAL LAW,
 - Charge of crime not known to law, 181.
 - Practice in Recorder's Court, 177.
 - Right of State to secure change of venue, 337.
 - Variance between name in information and proof, 177.

RECENT MICHIGAN DECISIONS—*Continued.*

- CROSS-EXAMINATION,**
 Right to, counsel not to be deprived of, 276.
 Latitude allowed in, 68, 73.
- DAMAGES,**
 For injuries caused by defective apparatus, 178.
 For land condemned for streets, how determined, 273.
 Measure of, in action by contractor for unreasonable delay, 298.
 Measure of, in actions for breach of contract, 73.
 Measure of, in actions for false representation, 175.
 Right of personal representative to recover, 72.
- DEBT,**
 Of another, verbal promise to pay, 31.
- DECLARATION,**
 Amendment of, power of court to permit, 180.
 Immaterial changes in, how treated, 143.
 Right to join counts for trover, trespass and assumpsit, 114.
- DECREE,**
 Right to amend, 75.
- DEPUTY,**
 Powers of deputy city clerk, 412.
- DEPUTY GAME AND FISH WARDENS,**
 Salaries of, how determined, 75.
- DETROIT HOUSE OF CORRECTION,**
 Fees of sheriff in conducting prisoners to, by whom paid, 110.
- DISCRETIONARY ACTS,**
 Of officers, right of court to review, 107.
- DIVORCE,**
 Effect of omission of oath relating to collusion in bill for, 109.
 Failure to provide domestic help as grounds for, 141.
 When allowed to defendant on answer, 271.
- DOGS,**
 Right to kill, 71, 413.
 Value of, how determined, 413.
 Whether nuisance, question for jury, 71.
- DOWER,**
 Effect of ante-nuptial agreements upon, 376.
 Right to, in mines unopened at husband's death, 223, 270.
- EJECTMENT,**
 Application of statute of limitations to, 113.
- ELECTION,**
 Distinction between general and special, 143.
 Inspectors of, right to change returns, 32.
- ELECTRIC STREET RAILWAYS,**
 (See Street Railways).
- EQUITY,**
 Jurisdiction of courts of, 277.
- EQUITY PLEADING,**
 When specific prayer for relief not required in answer, 274.
- ERROR,**
 When assignments of, deemed waived, 140.
- ESTATE,**
 Residue of, how determined under statute of distributions, 144.
- ESTOPPEL,**
 What suits not bar to others, 112.
- EXECUTION,**
 From justices' court, sufficiency of, 33.
 Property exempt from, how determined, 69.
 Right to set off, against another execution, 140.
- EXECUTOR,**
 Effect of appointment of mortgagor as, 73.
 Right to pledge estate of infant, 141.
 Validity of conveyance by one, when other fails to qualify, 275.
- EVIDENCE, (See Parol Evidence, Witness).**
 Boundary lines, how proved, 77.
 Court files, admissibility of, in another suit, 73.
 Deeds to determine ownership of real estate, 77.
 In actions for damages for negligent injuries, 298.

RECENT MICHIGAN DECISIONS—*Continued.***EVIDENCE,**

- In condemnation proceedings, to determine value of vineyard, 411.
- In determining value of animals, 413.
- In chancery cases, when taken in open court, 75.
- In seduction, what improper, 179.
- In trover, to prove value of property converted, 114.
- Malicious prosecution, how shown, 223.
- Of first wife, in action for bigamy, 377.
- Of good character, admissibility in assault and battery, 144.
- Of past and present sufferings, in actions for injuries, 276.
- Of State's witnesses, competency of, 336.
- Of wife, in actions for criminal conversation, 174.
- Res geste*, what considered as, in trial for murder, 180.
- To impeach witness, for what can be used, 111.
- To prove defective condition of sidewalks, 298.
- Touching bias or interest of witness, 112.
- What admissible in rebuttal, 77, 144.

FALSE IMPRISONMENT,

- Actions for, what must be shown in defense, 272.

FELLOW SERVANTS,

- Liability of master for injuries by, 31, 178, 275, 411.
- Who are, 411.

FIRE,

- When failure to prevent communication of, negligence, 179.

FIRE INSURANCE,

- Cancellation of policy, 70.
- Conditions in policy, when failure to comply with not material, 179.
- Covenants against additional, 112.
- Effect of foreclosure proceedings, 74.
- Proofs of loss, mis-statements in, 142.
- Proofs of loss, waiver of conditions in policy, 270.
- Proofs of loss, when failure to furnish amounts to forfeiture, 76.
- Right of mutual company to waive forfeiture, 142.
- Rights of mortgagor under policy payable to mortgagee, 74.
- Special privileges of mortgagee, 112.
- Waiver of defenses by company, 142.
- What acts vitiate policy, 174.
- When failure to furnish proofs amounts to forfeiture, 76.
- Written and printed clauses in policy, 74.

FIXTURES,

- Distinction between real and personal, 145.
- When personal, though attached to realty, 110.

FORECLOSURE,

- (See Mortgage).

FOREIGN PROCESS,

- Validity of service of, in the State, 415.

FRAUD, (See Fraudulent Conveyance).

- Instructions to jury in actions for, 276.
- When will vitiate contract, 274.

FRAUDULENT CONVEYANCE,

- Burden of proof to show, 141.
- How treated, as between parties thereto, 77.
- Setting aside of, 30, 31, 69, 274.

GARNISHMENT,

- Indebtedness created after writ issued, 108.
- Validity of proceedings in, 141.

GENERAL ISSUE,

- Right to make special defense under, 74.

GUARDIAN AND WARD,

- Compensation of guardian for ward's board, 270.
- When action against surety on bond may be brought, 174.

HABEAS CORPUS.

- Right to review judgment on, 76.

HIGHWAYS,

- Proceedings to lay out, legality of, 174.

RECENT MICHIGAN DECISIONS—Continued.

- HOMESTEAD,**
When claim of, to be made, 275.
- INDETERMINATE SENTENCE,**
Validity of, 76.
- INFANTS,**
Actions by, where undue advantage taken, 113.
When parents estopped from recovering for injuries to, 143.
- INFORMATION,**
Conviction of lesser crime under, 112.
Charging assault on two persons, 112.
Charging crime not known to law, 181.
When exact time and place immaterial, 270.
- INJUNCTION,**
Right to, in condemnation proceedings, 176.
- INSURANCE,**
(See Fire Insurance, Life Insurance.)
- INSURANCE COMPANY,**
Right to limit powers of agents, 76.
- JURY,**
Exemption from service on, as ground for challenge for cause, 108, 111.
Instructions to, when assignable as error, 177.
Of less than twelve, validity of trial by, 414.
Right of trial judge to give private instructions to, 141.
Submission to, of questions not in controversy, 73.
- JUSTICE'S COURT,**
How time of appearance to be entered upon docket, 33.
Judgment in, when validity cannot be assailed collaterally, 33.
- LARCENY,**
When value necessary allegation, 177.
- LEASE,**
Right of lessee to bring trover for ore, 375.
Right of lessor to question lessee's right to hold under, 111.
Tenancy by holding over, implied contract in, 178.
With option of longer term, waiver under, 180.
- LIBEL,**
Language libellous *per se*, 375.
- LICENSE,**
Right to recover fees paid under void ordinance, 298.
- LIFE INSURANCE,**
Assignment of, as security, 272.
Effect of by-law providing against suicide, 68.
Application of law of *locus contractus* to policies of, 175.
- LIEN,**
Manufacturer's, what amounts to surrender of, 141.
- LIQUOR TAX,**
Right of county treasurer to receive before bond filed, 144.
- LOCAL OPTION LAWS,**
Amenability of druggists to, 336.
- MALICIOUS PROSECUTION,**
Advice of counsel as defense, 272.
Damages by, how shown, 223.
Right to bring action for, 140.
- MANDAMUS,**
To collect delinquent taxes, when not allowed, 114.
To compel delivery of books to successor in office, 76.
To compel record and filing of city plat, 176.
To compel recount of votes, 32.
To compel taxation of mortgages, 176, 177.
To county treasurer, to refrain from receiving liquor tax, 144.
To dismiss bill for divorce, 109.
To enforce void sentence, 77.
To produce books for accounting, 76.
To supervisors, at suit of stranger, 31.
To supervisors, to assess judgment, 30.
- MANSLAUGHTER,**
Intoxication as defense for, 110.

RECENT MICHIGAN DECISIONS—*Continued*

- MANUMISSION,**
Of infant, what amounts to, 143.
- MASTER AND SERVANT,**
Implied contract as to wages, 174.
Liability of master for injuries to servant, 411.
- MINE,**
Dower in, when unopened at husband's death, 223, 270.
- MISJOINDER,**
Damages to defendant when declaration dismissed, 114.
- MORTGAGE, (See Redemption.)**
Assignee of, liability as to existing equities, 274.
Bill to enjoin foreclosure, 73.
Bill to reform, rights of subsequent mortgagees, 141.
Contribution in foreclosure, 145.
Liability of mortgagees after assignment, 273.
Of wife's property to pay husband's debts, 276.
Transactions construed as, 30, 75.
When sale set aside on grounds of mistake, 174.
- MULTIFARIOUSNESS,**
When prayer for different kinds of specific relief not, 277
- MUNICIPAL CORPORATIONS,**
Contracts with, right of common council to reject, 141.
Liability for injuries in alleys, 141.
- MUNICIPAL BONDS,**
Validity of, 181.
- MURDER,**
Statements of deceased, as part of *res gestae*, 180.
- NEGLECT,**
Contributory, acts constituting, 112.
Contributory, in collisions, 180.
Contributory, question for jury, 143.
Due care in actions for, how proven, 112.
Of fellow servant, liability of master for, 31, 178.
Of street-car driver, liability of company for, 67, 144.
Presumption as to, when determining whether contributory, 179.
Question for jury, 140.
When failure to prevent communication of fire is, 179.
- NEGOTIABLE PAPER,**
Of partnership, liability before notice of dissolution, 275.
Rights of *bona fide* holders, 74, 77.
Transfer of, for purpose of suit, 375.
Who *prima facie* entitled to payment, 77.
- NOTICE,**
Records of deeds as, to subsequent purchasers, 176.
To produce papers at trial, sufficiency of, 72.
- NOTICE TO QUIT,**
Admissibility of parol contemporaneous agreement to change terms of, 273.
- NUISANCE,**
Electric wires as, when improperly abated, 180.
- OBTAINING MONEY UNDER FALSE PRETENCES,**
Sufficiency of information for, 109.
- PAROL EVIDENCE,**
Admissibility of, in construing written contract, 73.
To aid incomplete record, 111.
To prove contents of lost document, 111.
To prove fraudulent alteration of contract, 274.
To show existence of written instrument, 72.
To vary terms of written contract, 174, 175.
- PARTNERSHIP,**
Actions against surviving partner, by whom brought, 271.
Failure to give notice of dissolution, 275.
Transactions construed as partnership dealings, 71.
- PERSONAL PROPERTY,**
When dwelling houses are, 336.
- PHYSICIANS,**
Duty of, to report infectious diseases, 110.

RECENT MICHIGAN DECISIONS—*Continued.*

- PLEADING,
Points not made in brief, right to pass upon, 276.
- PLEAS,
Puis darrein continuance, effect of, 113.
When motion to amend reviewed, 74.
- PROBABLE CAUSE,
In actions for malicious prosecutions, what constitutes, 272.
- PROBATE COURT,
Jurisdiction of, 276.
Testimony in, how taken, 32, 272.
- PROBATE JUDGE,
Right of appeal from decision of, 32, 271.
What orders of, unauthorized, 32.
When election to fill vacancy to be held, 143.
- PROSECUTING ATTORNEY,
Suppression of testimony by, 338.
- QUIET TITLE,
Bill to, jurisdiction of courts of equity, 277.
- QUO WARRANTO,
Right of, to test validity of deed, 175.
- RAILROAD COMPANIES,
Liability for carrying passengers beyond destination, 67.
Liability for injury in unblocked frogs, 140.
Liability for injuries on private crossings, 179.
Liability for injuries to passengers alighting, 178.
Notes in aid of, when void, 114.
Right to abandon track, 142.
Right to change right of way, 108.
Right to condemn land of another company, 272.
- RAILWAY STATION,
What constitutes, 114.
- REAL ESTATE BROKERS,
Right to commission, 111.
When jury to determine commission of, 275.
- REAL PROPERTY,
Conveyance to one when consideration paid by another, 118.
- RECOURSEMENT,
Failure to deliver within reasonable time, 73.
- REDEMPTION,
Allowed under prayer for general relief, 412.
Amount payable on, 270.
When decree will not be set aside, 144.
- REMOVAL,
From office, proceedings for, 107.
- RENTS AND PROFITS,
Right of widow to, before dower set aside, 111.
- REPLEVIN,
For goods held on attachment, 30.
Sufficiency of bond in, 412.
When demand not necessary, 141.
When may be brought, 68, 107.
- RESORTS,
Liability of proprietors of, for injuries to patrons, 414.
- SALE,
By sample and telegram, question for jury, 298.
Delivery of goods on trial, 67.
How intention to pass title determined, 177.
Upon warranty, presumption of acceptance, 174.
- SALOON,
What regarded part of, 107.
- SEDUCTION,
By promise of marriage, 411.
Evidence admissible in actions for, 179.
Infancy as defense in action for, 411.
- SET OFF,
When claim for, may be made, 140.

RECENT MICHIGAN DECISIONS—*Continued*.

- SHOOTING,**
 Into crowd, presumption as to intent, 270.
- SLANDER,**
 Joinder of courts charging, 142.
 Liability of one for words uttered by another, 177.
- SOLDIER'S HOME,**
 Pensions of inmates of, validity of rules concerning, 298.
- STATUTES, CONSTRUCTION OF,**
 2 How. Stat., § 5781. Advancement, 177.
 2 How. Stat., § 5847. Allowance for maintenance of widow, 271.
 2 How. Stat., §§ 9123, 9127. Arson, 298.
 Act of 1887. Damages for injuries on highways, 72.
 Act No. 175, P. A., 1885. Garnishment proceedings, 141.
 Act of 1887. Liability of Townships, etc., 181.
 3 How. Stat., § 4161 d 2. Meaning of "limitation of law," 110.
 Act No. 200, P. A. 1891. Mortgage tax, 177.
 2 How. Stat., § 8662. Order granting leave to file information, 175.
 2 How. Stat., § 6704. Payment of balance of mortgage debt, 273.
 2 How. Stat., § 9180. Penalty for horse stealing, 177.
 P. A. 1883, p 191. Penalty for unblocked "frogs" in railroads, 140.
 3 How. Stat., § 3375. Railway signals, 179.
 2 How. Stat., §§ 5824, 5847. Residue of estate, 144.
 2 How. Stat., § 7622. Trial by jury, etc., 414.
- STATUTE OF FRAUDS,**
 Creation of title to land under, 108.
- STATUTE OF LIMITATIONS,**
 As to mortgages, how question may be raised, 299.
 When begins to run in certain cases, 271, 274.
- STIPULATIONS,**
 In open court, effect of, 274.
- STREET RAILWAY COMPANIES,**
 Liability for injuries to passengers while alighting, 67, 144, 276.
 Right to enforce conditions in transfer tickets, 275.
- STREET RAILWAYS,**
 Wires of electric, when trespass to cut, 180.
- SUBROGATION,**
 (See surety.)
- SUICIDE,**
 Right of beneficiary to recover insurance after, 68.
- SUMMONS,**
 Mistake of date in return, when immaterial, 275.
- SUNDAY,**
 Keeping saloon open on, what constitutes, 107.
 Right of bartender to frequent saloon on, 107.
- SUPERIOR COURT OF GRAND RAPIDS,**
 Jurisdiction of, 413.
- SURETY,**
 How affected by doctrine of subrogation, 180.
 Rights of, after default of principal, 71.
 What acts will discharge, 71.
- SWITCH-BACK RAILWAYS,**
 Liability for injuries on, 414.
- TAXATION,**
 Assessment to pay damages for opening street, 274.
 Collection of delinquent taxes, 114.
 Irregularities in assessment, 109.
 Of mortgages, when mandamus issued to compel, 176.
 Mortgages to be deducted from assets, 176, 177.
 Right of Board of Supervisors to determine township taxes, 109.
 Setting aside tax deed, burden of proof on, 109.
 Unequal assessment, rights of persons affected by, 113.
- TENDER,**
 Sufficiency of, to redeem from chattel mortgage, 179.
- TOWNSHIPS,**
 Liability for defective cross-walks, 181.
 Power to make affidavit in behalf of, 33.
 Right to sue and be sued, 110.

RECENT MICHIGAN DECISIONS—*Continued.*

- TRANSFER TICKETS,**
 Passenger's duty to comply with conditions thereof, 275.
- TRESPASS,**
De Bonis Asportatis, what constitutes, 140.
Quare Clausum, what proof of possession necessary, 178.
 When action for, barred by statute of limitations, 68.
- TRIAL,**
 By jury of less than twelve, validity of, 414.
- TROVER,**
 Against sheriff, by *mala fide* creditors, 142.
 Proof of value of property converted, 114.
 Right of lessee to bring, for ore mined from premises, 375.
 Sufficiency of declaration in, 144.
 Title necessary to bring action of, 108.
 When may be brought for shares of stock, 223.
 When no demand necessary, 73.
- TRUSTEE,**
 Necessity of formal acceptance of trust fund, 145.
- UNDUE INFLUENCE,**
 Conveyance obtained by, when re-conveyance ordered, 271.
 Setting aside deed on grounds of, 69.
 When not presumed, 111.
- UNILATERAL CONTRACT,**
 Liability of parties to, 414.
- USER,**
 Title by, 69.
- VAGRANT,**
 Who is, 30.
- VARIANCE,**
 Between declaration and proof, effect of, 112, 140, 180.
 When question of, to be raised, 112.
- WIDOWS,**
 (See Dower). Election to take under statute instead of will, 276.
- WILLS,**
 Construction of, 70, 176.
 Contesting, when undue influence not presumed, 111.
 Right to change beneficiary in insurance policy by, 32.
 When parol evidence admissible to prove contents of, 178.
 With contract annexed, effect of revocation, 178.
- WITNESS,**
 Duty of prosecuting attorney to call, 338.
 For State, competency of, 336.
- WRIT OF ERROR,**
 What constitutes final determination so as to bring, 72.
- WRITTEN INSTRUMENT,**
 Admissibility of oral agreement to vary terms of, 69.

Standard Law Library



3 6105 063 051 531



